Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, *et al.*,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED FOR REVIEW

As regards Constitutional questions—

1. In the instant action, was the Petitioner denied his right of due process (*i.e.*, timely notice and an adequate opportunity to be heard before an impartial tribunal *before* being deprived of a significant property interest), consistent with *Connecticut v. Doehr*, 501 US —, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991), and/or denied his right to equal protection under law, guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution (applicable to a mechanics' lien wherein the owner is deprived of a significant property interest), and/or denied his right to have jury questions submitted to a jury, when the Petitioner's circumstances place him in the position that factual determination concerning disputed, pleaded, facts must be submitted to a jury for *sole* determination by that jury, guaranteed by the Seventh Amendment of the United States Constitution and in controversies respecting property and in suits between man and man, guaranteed by the Virginia Constitution in Article I, § 11:

A. By the trial court's application, without regard to abuses of privilege as set forth in *White v. Nicholls*, 3 How. (44 U.S.) 266, 11 L.Ed 591, — S.Ct. — (1845), both upon *demurrer* and upon *petition to rehear*, of the *Donohoe* rule of absolute privilege [*Donohoe Constr. Co. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988)] to two false, perjured, forged, invalid, unlawful mechanics' liens, and a "certificate of partial release of mechanics' lien," employing the false, perjured, forged, mechanics' lien as true, all three documents pleaded as being sham, which appear regular upon their face, but of which two liens were later adjudicated to be "is and was invalid," prior to *petition to rehear* and *appeal*? That is:

(1) Did the trial court err when it ignored consideration of United States and Virginia constitutional law as to whether three libelous documents—two libelous, false, perjured, forged documents, entitled "memorandum of mechanic's lien" and one false document entitled "certificate of partial release of mechanic's lien," containing another mechanics' lien and incorporating by reference

and employing as true one of the prior false, perjured, forged liens—were actually mechanics' liens within the purview of *Connecticut v. Doehr, supra*, the Fourteenth Amendment of the United States Constitution, and Article I, § 11, of the Virginia Constitution, although these three documents were filed without notice and without prior hearing, thus without Due Process to the lienee/-property owner, and deprived the lienee/property owner of two significant constitutionally-protected interests: (a) as a lien, by invading his property interest, and (b) as a libelous lien, employed as ancillary process, by invading his liberty interest.

Thus, were these documents violative of Due Process?

(2) Did the trial judge err when he made finding of fact as to whether three libelous documents—two libelous, false, perjured, forged documents, entitled "memorandum of mechanic's lien" and one false document entitled "certificate of partial release of mechanic's lien," containing another mechanics' lien and incorporating by reference and employing as true one of the prior false, perjured, forged liens—were actually mechanics' liens within the purview of the *Donohoe* rule of absolute privilege for mechanics' liens [*Donohoe Constr. Co. v. Mount Vernon Assoc., supra*], although these three documents were sham—filed in false, *feigned* claimant name of a person not in life, with false claimant address, for false amount, with perjured oath and forged signature, and not in compliance with *Virginia Code (1950)*, as amended, *§43-4* and *§43-5*, for the creation of mechanics' liens (all *res judicata* prior to *Petition to Rehear* to the trial court and *Petition for Appeal* to the Virginia Supreme Court)—and pleaded as such.

Thus, were these documents actually mechanics' liens, the filing of which were occasions entitled to privilege, or were they sham?

(3) Did the trial court err when it dismissed (over objection and demand for jury trial) 10 counts of defamation and slander of title upon *demurrer*, without leave to amend, (and failed to vacate its findings of fact upon *petition to rehear*) solely on a trial judge's decision of contested fact—without the disputed, pleaded, facts, including malice, being submitted to a jury for that jury to

determine, in accordance with *Stanardsville Volunteer Fire Co. v. Berry*, 229 Va. 578, 331 S.E.2d 466 (1985); *O'Brien v. Snow*, 215 Va. 403, 210 S.E.2d 165 (1974); *Speet v. Bacaj*, 237 Va. 290, 377 S.E.2d 397 (1989); and *Edlow v. Arnold*, 243 Va. 345, 415 S.E.2d 436 (1992):

a. upon the *evidence* as to the liens, attached to and submitted with the *Motion for Judgment* (which evidence would warrant a jury in finding a verdict therewith), if the specific, pleaded, occasions of the false documents being recorded in the public records are occasions of privilege, and

b. depending upon the subclass of privilege to which the documents belonged, (i) whether there was an abuse of privilege, (ii) whether words were used *bona fide*, or (iii) whether malice, as pleaded, marked the publications in the libelous mechanics' liens [see *White v. Nicholls, supra*]?

Thus, were questions of disputed facts, as to the facts constituting the occasions, properly determinable by a jury, determined by a jury or by the trial judge invading the prerogatives of the jury?

(4) Did the trial court err when it conferred (upon disputed, pleaded, facts and over objection and demand for jury trial) absolute privilege upon libelous documents entitled mechanics' liens, adjudicated-invalid, which are in false, *feigned* claimant name of a person not in life, false claimant address, for false amount, with perjured oath and forged signature, and not in compliance with *Virginia Code (1950)*, as amended, *§ 43-4* and *§43-5*, for the creation of mechanics' liens (and failed to vacate its findings of fact upon *petition to rehear*);

Thus, were questions of law, as to the nature of the occasions being occasions entitled to privilege, and whether privilege was abused so as to defeat that privilege, resolved properly by the trial judge?

(5) Did the trial court err when it granted the defense of absolute privilege (over objection) to defendants who were neither

parties nor pleaders to the false, libelous mechanics' liens, two of which liens were filed in the *feigned* claimant name of a not-in-life person (and failed to vacate its findings of fact upon *petition to rehear*) [see *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065 (1942)]?

Thus, if there was privilege, did it apply to all and sundry who might be charged, or only to parties and pleaders to the occasions?

(6) Did the trial court err when it granted the defense of absolute privilege (over objection) to a "Certificate of Partial Release of Mechanics' Lien," which contains elements of a mechanics' lien and which lien was subsequently adjudicated to be "is and was invalid," (and failed to vacate its findings of fact upon *petition to rehear*)?

Thus, if there was privilege upon an initial occasion of judicial publication, did that privilege flow over to a subsequent occasion of judicial republication, which was an abuse of the first process?

In summary, was the application by the trial judge of United States constitutional law, and of Virginia constitutional law, statutory law, and case law proper, both initially upon demurrer *and upon* Petition to Rehear*?*

B. By the Virginia Supreme Court's (1) refusal to hear *Petition for Appeal*, citing no error in the trial court's October 30, 1992, decision whereby the trial judge had sustained Respondents' *demurrer* and dismissed, without leave to amend, 10 counts of defamation arising from libelous, false, invalid mechanics' liens signed, sworn to, and filed in a false, *feigned*, unregistered fictitious name of a not-in-life person, under a plea of absolute privilege, arising under *Donohoe, supra*, and (2) denial of *Petition for Rehearing*, without regard to Petitioner's claims that his Constitutional rights of Due Process and Equal Protection had been violated and without any stated reason for such denial, where Petitioner raised questions of :

a. Petitioner's right to jury determination of questions of fact

regarding absolute privilege and the abuse thereof, in accordance with *White v. Nicholls, supra*;

b. The application of absolute privilege only to parties and pleaders to the privileged occasion, in accordance with *Laun v. Union Electric Co. of Missouri, supra*;

c. The abuse of court process and privilege by two mechanics' liens filed in false, *feigned*, fictitious claimant name of a not-in-life person, in contravention of *Howard v. Rawson and Pugh*, 29 Va. (2 Leigh) 733 (1830), and *Pates v. St. Clair*, 52 Va. (II Gratt. 22) 25 (1854); and

d. The relevancy of words used to the occasion of privilege and whether privilege extends to another occasion, as determined in *Higgins v. Coal Co.*, 103 W.Va. 504, 138 S.E. 112 (1927), as cited with approval in *Penick v. Ratcliff*, 149 Va. 618, at 636, 140 S.E. 664 (1927).

(3) That is:

a. Did the Virginia Supreme Court err in refusing Petitioner's *Petition for Appeal*, dated August 6, 1993, and thereby deny to Petitioner his rights of due process and of equal protection under the law, guaranteed under the Fourteenth Amendment of the United States' Constitution and Article I, § 11, of the Virginia Consititution, and of civil trial by jury, in a common-law action for damages, including punitive damages, guaranteed under the Seventh Amendment of the United States' Constitution and Article I, § 11, of the Virginia Constitution?

b. Did the Virginia Supreme Court err in denying Petitioner's *Preliminary Petition for Rehearing*, dated January 27, 1994?

c. Did the Virginia Supreme Court err in denying Petitioner's *Motion for Extension of Time to File Complete Petition for Rehearing Brief*, dated January 27, 1994, citing extenuating *force majeure* circumstances, and in refusing to consider Petitioner's *Supplement to Petition for Rehearing*, dated February 8,

1994, containing Petitioner's argument on the applicability of *White v. Nicholls, supra*?

d. Did the Virginia Supreme Court err in denying Petitioner's *Petition to Rehear Motion for Extension of Time to File Complete Petition for Rehearing Brief*, dated February 27, 1994, elaborating on the extenuating *force majeure* circumstances, pleaded previously, and invoking the constitutional-question, extension-of-time provision of Virginia case law [see *Coleman v. Thompson*, — U.S. —, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), cited in notes to Rule 5:5, of the *Rules of the Supreme Court of Virginia*, at 168.]?

Thus, was the application by the Virginia Supreme Court of United States Supreme Court constitutional law, Virginia constitutional law, Virginia case law, and other state supreme court's stare decisis *proper, both initially upon its refusal of* petition for appeal *and upon its denial of* petition for rehearing?

As regards specific trial court errors—

2. Did the Petitioner have a right in a common-law action for damages, including punitive damages, to require submission to a jury of the disputed, pleaded, facts, concerning the publications in false mechanics' liens, pleaded as being libelous, defamatory, and malicious, for that jury, rather than the trial judge, to make *factual determinations* as follows:

a. For the jury, properly instructed, to determine—from among the disputed, pleaded facts and documentary *evidence* attacvhed to and submitted with the *Motion for Judgment* (which evidence would warrant a jury in finding a verdict in accordance therewith)—those facts which constitute the documents as being an occasion belonging to one of the four subclasses of privileged communications [see *White v. Nicholls, supra*] (upon which facts the court would then rule in law as to the nature of the occasion and the privilege to be accorded to the parties thereto);

b. Depending on the subclass of privileged communications to which the documents are found to belong, for the jury to

determine (1) whether there was an abuse of privilege associated with an occasion of absolute privilege sufficient to render the publications actionable, (2) whether words were used *bona fide*, and (3) whether malice, as pleaded, did or did not mark these publications?

Thus, did the trial judge usurp the jury's prerogative to decide question of fact?

3. Was the nature of privilege which each defendant is entitled to assert in conjunction with the occasion of each count, in regard to the publication of defamatory matter, determined by the character of office of that defendant relative to that occasion, in accordance with *Laun v. Union Electric Co., supra?*

4. Can joint tortfeasors or co-conspirators shelter themselves behind the privilege which one tortfeasor or conspirator may be entitled to assert, in contravention of *Rice v. Coolidge*, 121 Mass. 393, 23 Am Rep 279 (1876), as cited with approval in *Laun v. Union Electric Co, supra*?

5. Did the Respondents, as malicious republishers in the judicial process, in a false, adjudicated-invalid, unlawful "Certificate of Partial Release of Mechanics' Lien," employing the original false, invalid, perjured, forged lien as true (after being advised twice in writing of its falseness, invalidity, perjury, and forgery), share any privilege which original publishers—including the *feigned*, not-in-life claimant—may be entitled to assert in regard to the publication of defamatory matter, or did each republisher necessarily justify their republication or bring themselves within an absolute or conditional privilege to be exonerated?

6. Was the test of whether the privilege associated with a specific occasion extends to a particular statement published by a defendant on that occasion, or on *another* occasion, the relevancy of that particular statement to the specific occasion from which privilege is asserted, in accordance with *Higgins v. Coal Co., supra*, as cited with approval in *Penick v. Ratcliff, supra?*

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, et al.,

Respondents[1]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Kendall H. Breedlove, the Petitioner herein, respectfully prays that a *writ of certiorari* issue to review the judgments of the Supreme Court of the Commonwealth of Virginia, entered in the above-entitled case on February 25, 1994, and March 8, 1994.

OPINIONS BELOW

1. The October 30, 1992, decision of the Circuit Court of Fairfax County, Virginia, (the trial court) on hearing of *demurrer* in *Breedlove v. Phillips, et al.*, (19th Cir., at law #117967, 1993), dismissing 10 counts of defamation without leave to amend, is the underlying decision sought to be reviewed and is reprinted in the separate Appendix to this *Petition*, at Exhibit 1, at pages A3-A4.

2. The subsequent denial by the trial court, in letter opinion dated July 5, 1993, of Plaintiff's *Petition to Rehear*, dated June 2, 1993, and accompanying *Memorandum in Support of Plaintiff's*

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[1] The full list of the parties, as captioned, to the proceedings in the Court below, for *Breedlove v. Phillips, et al.*, (— Va. — [unpublished], record no. 931104, 1994) may be seen at Appendix Exhibit 15, p. A34.

Petition to Rehear, sought to have reheard the argument of Defendant's *demurrer*, based on new evidence and *res judicata* from related cases involving the same matters and defendants. This is the decision appealed to the Virginia Supreme Court and is reprinted as Appendix Exhibit 2, at page A5.

3. The September 17, 1993, final *order* by the trial court, denying the Petitioner's *Petition to Rehear*, of June 2, 1993, and incorporating by reference the trial court's letter opinion dated July 5, 1993, is reprinted as Appendix Exhibit 3, at pages A6-A7.

4. The January 13, 1994, decision of the Virginia Supreme Court, refusing Petitioner's *Petition for Appeal*, stating there was no trial court error, is the underlying decision sought to be reviewed and is reprinted as Appendix Exhibit 4, at page A8.

5. The February 10, 1994, decision of the Virginia Supreme Court, denying Petitioner's *Motion for Extension of Time to File Complete Petition for Rehearing Brief*, is sought to be reviewed and is reprinted as Appendix Exhibit 5, at page A9.

6. The February 25, 1994, decision of the Virginia Supreme Court, denying the *Preliminary Petition for Rehearing*, is sought to be reviewed and is reprinted as Appendix Exhibit 6, at page A10.

7. The March 8, 1994, decision of the Virginia Supreme Court, denying Petitioner's *Petition to Rehear Motion for Extension of Time to File Complete Petition for Rehearing Brief*, is sought to be reviewed and is reprinted as Appendix Exhibit 7, at page A11.

JURISDICTION

The judgment of the Virginia Supreme Court, denying Petitioner's *Preliminary Petition for Rehearing*, dated January 27, 1994, was entered February 25, 1994. Subsequent judgments of the Virginia Supreme Court on supplemental *petitions for rehearing* of related matters culminated in the entry on March 8, 1994, of the final judgment by the Virginia Supreme Court on this matter. The jurisdiction of this Court is invoked pursuant to *28 USC § 1257 (a)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment of the United States Constitution, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**"

And the Seventh Amendment of the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved,** and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Also involved is article I, § 11, of the Virginia constitution:

> "That **no person shall be deprived of his life, liberty, or property without due process of law**; ... that in controversies respecting property, and in suits between man and man, **trial by jury is preferable to any other, and ought to be held sacred.** * * *"

Also involved are the Virginia mechanics' lien statutes, *Virginia Code (1950)*, as amended, *§43-1* through *§43-23.2*, and the Virginia Statute of Frauds, *Virginia Code (1950)*, as amended, *§11-2*.

STATEMENT OF THE CASE

1. On November 27, 1991, a memorandum of mechanics' lien was filed in the land records of Arlington County, Virginia,

signed, sworn to, and filed in the claimant name *Dennis Anderson*, against Petitioner's Florida Street property, a detached, single-family house, claiming $51,768.09 as due. Then, on January 14, 1992, a memorandum of mechanics' lien was filed in the land records of Prince William County, Virginia, signed, sworn to, and filed in the claimant name *Dennis Anderson*, against Petitioner's Castile Court property, an attached, single-family townhouse, claiming $2,907.00 as due. Both of these liens were filed by Respondent Phillips, as he admitted, under oath, in judicial admission subsequently. The $51,768.09 claim was based upon an alleged unsecured, verbal contract covering work for 22 months, allegedly unpaid, which contract was in violation of Virginia's Statute of Frauds (*Virginia Code §11-2*), as over $25,000 and for a period over one year. The November 27, 1991, and January 14, 1992, liens were filed in false, unregistered fictitious claimant name—*Dennis Anderson*—false claimant address, false amount, with perjured oath and forged signature.

2. The first, false, November 27, 1991 *Dennis Anderson* mechanics' lien was filed by Respondent Phillips for $51,768.09 against Petitioner's Florida Street property, having 1992 county-assessed value of $214,500, and a first turst of about $108,000, at a time when Respondent Phillips knew Petitioner was contemplating refinancing the property. The subsequent lien against this property, in the different claimant name "Phillips," contained within the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien," claiming under the November 27, 1991 *Dennis Anderson* lien, claimed $13,014 as due. Thus, the total encumbrance of liens on the Florida Street property totaled about $172,781, approximately 80 percent encumbrance-to-value ratio—and more than sufficient to prevent any refinancing, especially as any "second trust" lender would confront the risk of taking a *fourth* position, the two mechanics' liens having usurped first and second priorities, and the "first trust" loan now being in third position.

3. The second, false, January 14, 1992 *Dennis Anderson* mechanics' lien was filed by Respondent Phillips for $2,907.00 against Petitioner's Castile Court property, at a time when Phillips knew Petitioner was attempting actively to sell that property.

4. During the first week of February, 1992, Respondent Phillips was arrested in Fairfax, Virginia, on a 14-year-old warrant for interstate flight to avoid imprisonment for conviction of forgery in Tennessee. Following Phillips' arrest, Phillips telephoned Petitioner from the Fairfax jail, and told Petitioner that Phillips' legal fee for extradition defense would be $18,000. Phillips waived extradition proceedings in hearing on March 12, 1992, and allowed himself to be transported voluntarily to Tennessee and prison.

5. On March 31, 1992, Respondent Joyce Horton, who is Phillips' sister, asked Petitioner, over several denials by Petitioner, to pay $50,000 to satisfy an alleged debt she claimed Petitioner owed to Phillips for construction work on the Florida Street property. She made this demand in a telephone call with Petitioner, which she instigated. On April 12, 1992, Respondent Joyce Horton again asked Petitioner, again over Petitioner's denials, first to pay $50,000, then to pay $16,000, or "they would have to go ahead with this mechanics' lien." Petitioner denied the claim and, at the time, was unaware of what mechanics' lien she was referring to. She made this second demand for payment in a second telephone call with Petitioner, which she instigated.

6. On April 22, 1992, by attorney letter of that date, enclosing and incorporating the November 27, 1991 mechanics' lien as true, Respondent Phillips, by counsel, sought to collect from Petitioner on the alleged $51,768.09 debt (filed in claimant name *Dennis Anderson*). In two letters to the attorney, dated May 4, 1992, and May 13, 1992, Petitioner denied the claims and pointed out the illegalities and defects inherent in the November 27, 1991, and January 14, 1992, *Dennis Anderson* mechanics' liens.

7. On May 7, 1992, Respondent Phillips, by his sister Joyce Horton, as agent, filed another mechanics' lien against the Castile Court property, claiming $11,700 in the claimant name "Phillips," naming Petitioner as named lienee. This Castile Court property no longer belonged to the Petitioner. Petitioner had sold this property, transferred title and settled on it March 23, 1992, and the deed was recorded on March 24, 1992, 44 days prior to Respondent Phillips filing his May 7th lien.

8. On May 26, 1992, Respondent Phillips, by his sister, Joyce Horton, as agent, filed the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien," containing another mechanics' lien, in the Arlington County land records: (a) releasing claims for 17 months' work allegedly performed earlier than 150 days prior to the date of the lien, totaling $38,754.09 of the claimed $51,768.09, (b) changing the claimant name to that of Phillips (underlining "Phillips," to create indexing in that claimant name of the unreleased $13,014 balance), (c) employing the November 27, 1991 lien as true, incorporating it by reference, and (d) stating, "The Claimant intends to claim the benefit of a mechanics' lien." Concurrently, Respondents filed an action in debt against Petitioner (Count II) in Arlington County Circuit Court, on an alleged unsecured verbal contract, and an action to enforce both the November 27, 1991 lien of *Dennis Anderson*, and the May 22, 1992, lien of Phillips, for the benefit of now-claimant Phillips (Count I) in *Phillips v. Breedlove*, (17th Cir., Arlington chancery #92-532, 1993).

9. Petitioner responded, *pro se*, by *demurring* in *Phillips v. Breedlove, supra*, and by entering suit, *pro se*, against Respondents in Fairfax County Circuit Court (as the conspiracy arose in Fairfax), for libel of name, statutory defamation, defamation of title, and conspiracy, in *Breedlove v. Phillips, et al.*, (19th Cir., Fairfax at law #117967, 1993), the suit from which this *petition for writ of certiorari* arises, and submitted therewith *evidence* as to the liens, which would warrant a jury in finding a verdict therewith.

Basis of the Petition—

10. This *petition* comes on the basis that:

a. The Virginia judicial procedure for redress of libelous mechanics' liens, embodied in *Donohoe Constr. Co. v. Mount Vernor Assoc., supra*, in its application herein, is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution and repugnant to the Civil Trial by Jury Clauses of the Seventh Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution.

b. The Virginia mechanics' lien statutes, as applied herein, are repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution.

11. In the instant action underlying this *petition for certiorari*, the Respondents' underlying claim—that the Petitioner, as lienee of two mechanics' liens, was "justly indebted" to the claimant lienor—a false, *feigned*, fictitious, not-in-life person—was untrue.

12. Thus, although there was no factual basis upon which a mechanics' lien could have been brought lawfully, two of the Petitioner's properties were liened by two mechanics' liens of the *feigned* person, liens filed in false, *feigned* claimant name of a not-in-life person, with false address, for false amount, with perjured oath, and forged signature; then, those two properties were subsequently falsely liened again by Respondents, in a different claimant name, by *two more* liens, one of which employed the prior false, perjured, forged November 27, 1991 lien as true, instigated and created by an *attorney*, for Respondent Phillips, after Petitioner advised the attorney twice in writing of the falsity, invalidity, perjury, and forgery involved in the first two liens.

13. Clearly, in the case at hand, the provisions of Due Process of the Virginia mechanics' lien law, as applied herein, failed miserably to protect the Petitioner from erroneous or false or fraudulent, or malicious deprivation of a significant property interest, and the Petitioner's rights were trampled, first forward then backward, by malicious individuals bent on extortion. Further, the impractical and unconstitutional procedures in Virginia for redress, deprived the Petitioner of his Federal civil rights protected under 28 USC §1983.

The Rulings Below: *The trial court rulings—*

14. The original *Motion for Judgment* in *Breedlove v. Phillips et al.*, (19th Cir., Fairfax County, At Law #117967, 1993), filed August 27, 1992, contained twelve counts: 10 defamation counts and 2 conspiracy counts. In a hearing on the Defendants' *Demurrer*, on October 30, 1992, Counts I through X, the

defamation counts, were dismissed without leave to amend, in *order* of October 30, 1992 (see Appendix Exhibit 1, at pages A3-A4) *solely* on decision by the trial court judge, without benefit of jury determination of disputed, pleaded, facts, (including whether the occasion of filing was sham or malicious) on the basis of a defense of absolute privilege arising under *Donohoe Constr. Co. v. Mount Vernon Assoc., 369 S.E.2d 857, 235 Va. 531 (1988).* The trial judge dismissed based on the principles: (1) that a mechanics' lien is entitled to absolute privilege against defamation or slander of title, as a judicial action, in accordance with *Donohoe, supra*; (2) that such defense of absolute privilege may be asserted by all and sundry, regardless of whether they are parties or pleaders to the mechanics' lien or the suit to enforce or not; and (3) that no abuse of privilege is sufficient to defeat such absolute privilege. Counts XI and XII, the conspiracy counts, were dismissed with leave to amend and were so amended. The *Amended Motion for Judgment* (At Law #117967) has been sustained against Defendants' subsequent *Demurrer*. The Petitioner voluntarily nonsuited Counts I and II of the *Amended Motion for Judgment* (old Counts XI and XII of the original *Motion for Judgment*) by *order* dated July 16, 1993.

15. In *Breedlove v. Phillips et al.*, Fairfax at law #117967, Petitioner alleged being defamed by the Respondents' filing of two false, fictitious mechanics' liens, filed in false, unregistered fictitious claimant name—*Dennis Anderson*—at false address, false amount, with perjured oath and forged signature (all *res judicata* prior to *Petition to Rehear* and *Petition for Appeal*) and a third false lien contained within the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien," incorporating by reference and employing as true the prior false, perjured, forged November 27, 1991 lien.

16. Subsequent to October 30, 1992, the date of dismissal of the defamation counts I through X, (but prior to Petitioner's *Petition to Rehear* to the trial court and *Petition for Appeal* to the Virginia Supreme Court), two of these liens against the Petitioner's Florida Street property had been adjudicated to be **"is and was invalid,"** by the Circuit Court of Arlington County, Virginia, in two *Virginia Code §43-17.1* suits—*Breedlove v. Phillips and Horton*, (17th Cir., Arlington County chancery #92-609, 1993) and *Breedlove v.*

Phillips and Horton, (17th Cir., Arlington County chancery #92-701, 1993), in complaints filed *pro se* by Petitioner June 18, 1992, and July 16, 1992, respectively. For final *Order*, dated February 26, 1993, in Chancery #92-609; see *order* at Appendix Exhibit 8, at pages A12-A15; for final *Order* dated April 8, 1993, in Chancery #92-701; see *order* at Appendix Exhibit 9, at pages A16-A19.

17. The remaining January 14, 1992 mechanics' lien, in the false, fictitious, *feigned* name *Dennis Anderson*, complained of in the original and amended *Motions for Judgment*, of the instant *Breedlove v. Phillips, et al., supra*, had been extinguished by operation of law without a suit to enforce having been brought by Respondents within the statutory six-month period.

18. Additionally, subsequent to October 30, 1992, in Arlington County Circuit Court, Respondent Phillips, by counsel, nonsuited Count I of *Phillips v. Breedlove*, (17th Cir., chancery #92-532, 1993) (the suit to enforce the November 27, 1991 mechanics' lien against Petitioner Breedlove) on January 22, 1993. Subsequently, Respondent Phillips, by counsel, non-suited the remaining Count II (the claim in contract against Petitioner Breedlove) of chancery #92-532, on March 26, 1993, before the bench, immediately prior to Breedlove's scheduled argument of Breedlove's *Demurrer* to chancery #92-532, which *Demurrer* raised six affirmative defenses, including Estoppel, Waiver, Statute of Frauds, Fraud, Overstatement and Payment, and Illegality, and cited the other defects of Phillips' *Bill of Complaint* in its failure: (a) to allege the necessary elements of a contract; (b) to set forth the allegations necessary to take the alleged verbal contract, in excess of $25,000 and for performance beyond one year, out of the code provisions of the Virginia Statute of Frauds (§11-2).

19. The adjudication of related *Virginia Code §43-17.1* suits on the validity of the November 27, 1991, and May 22, 1992, mechanics' liens, *Breedlove v. Phillips and Horton*, (chancery #92-609), and *Breedlove v. Phillips and Horton*, (chancery #92-701), respectively, in Arlington Circuit Court, has rendered *res judicata* many issues contained in this underlying cause, *Breedlove v. Phillips, et al.*, (19th Cir., Fairfax County at law #117967, 1993).

20. On June 2, 1992, Petitioner filed his *Petition to Rehear* with the trial court, seeking to have reheard the October 30, 1992, *demurrer* hearing on the basis of new matter resulting from the two adjudicated *§43-17.1* cases in Arlington. This *Petition to Rehear* identified six sources of error and sought to have those questions resolved. **See** six sources of error in excerpt from *Plaintiff's Petition to Rehear*, dated June 2, 1993, at Appendix Exhibit 13, at pages A27-A28, and in excerpt from *Plaintiff's Memorandum in Support of Plaintiff's Petition to Rehear*, dated June 2, 1993, at Appendix Exhibit 14, at pages A29-A33.

21. The trial court ruled on this *Petition to Rehear* in letter opinion ruling of July 5, 1992, in *Breedlove v. Phillips, et al., supra.* (**see** letter opinion at Appendix Exhibit 2, at page A5), denying Petitioner's *Petition to Rehear* without comment.

22. On July 19, 1992, Petitioner filed his *Notice of Appeal* with the trial court. Petitioner decided to file the *Notice of Appeal* on July 19, 1993, based upon the statement of a court law clerk, on July 7, 1993, that the trial judge had signed the letter ruling on July 6, 1993, and that it had been mailed to Petitioner on that day. This letter opinion ruling of July 5, 1993, although signed, was "lost" in the courthouse, was not entered in the court's order book, was not filed in the official trial case file, and was not mailed to the Petitioner, until July 20, 1993. This was one day after Petitioner had filed his *Notice of Appeal* on July 19, 1993, with the trial court, to preserve Petitioner's right of appeal.

23. Petitioner's evidence, presented to the Virginia Supreme Court in *affidavits*, as part of the record, supports the Petitioner's contention that the "lost" letter opinion ruling of the trial court placed the Petitioner in an untenable position with regard to when to file his *Notice of Appeal:* if he waited to have the letter ruling in hand, his *Notice of Appeal* would likely be dated more than 30 days after the date of the unseen letter ruling. This evidence, concerning the "lost" letter opinion ruling, of July 5, 1993, was never contested, either by the Respondents or by the trial court, its judge or officers.

The Virginia Supreme Court rulings--

24. On August 6, 1993, Petitioner filed Petitioner's *Petition for Appeal* in *Breedlove v. Phillips, et al.*, as record no. 931104, with the Virginia Supreme Court, appealing the July 5, 1993, denial of Petitioner's *Petition to Rehear*, filed June 2, 1993, without comment, in letter opinion of July 5, 1993.

25. Petitioner's *Petition for Appeal* claimed six errors in Judge Hancock's decision of October 30, 1992, whereby the Judge dismissed, without leave to amend, 10 counts of defamation arising from false, invalid mechanics' liens signed, sworn to, and filed in a false, *feigned*, unregistered fictitious name—*Dennis Anderson*—under a plea of absolute privilege, arising under *Donohoe, supra.* These are the same six errors which had been denied rehearing in the trial court's letter opinion of July 5, 1992. (See six trial court errors, in excerpt from Petitioner's *Petition for Appeal*, dated August 6, 1993, at Appendix Exhibit 15, at pages A34-A35.)

26. On December 17, 1993, Petitioner made oral argument of his *Petition for Appeal* before the Virginia Supreme Court.

27. On January 13, 1994, the Virginia Supreme Court refused Petitioner's *Petition for Appeal*, without opinion, citing no trial court errors, in order of January 13, 1994, in *Breedlove v. Phillips, et al.* (— Va. — [unpublished], record no. 931104, 1994), see Appendix Exhibit 4, at page A8.

28. On January 27, 1994, Petitioner submitted his six-page *Preliminary Petition for Rehearing and Motion for Extension to Time to File Complete Petition for Rehearing Brief*, in the midst of the worst winter weather which the area had experienced in a century, closing the Federal government, schools, businesses, courts, and the law library which the Petitioner uses. This six-page *preliminary petition for rehearing* focused on the issue of the defense of absolute privilege only being accorded to parties and pleaders to the privileged occasion, in accordance with *Laun v. Union Electric Co. of Missouri, supra.* Petitioner's *motion for extension* sought brief, reasonable extension of time to file a complete 15-page *Petition for*

Rehearing, in proper form, to replace the six-page *preliminary petition*, in motion form, based on the *force majeure* circumstances of the weather and law library closings.

29. On February 8, 1994, Petitioner submitted his complete, 15-page *Petition for Rehearing*, in proper form, to replace the *preliminary petition*. Petitioner prayed to have reheard his *Petition for Appeal*, and submitted the complete brief, entitled *Supplement to Petition for Rehearing*, dated February 8, 1994, (*i.e.*, the complete *petition for rehearing* brief) to replace Petitioner's *Preliminary Petition for Rehearing and Motion for Extension of Time to File Complete Petition for Rehearing Brief*, filed January 27, 1994. This complete brief focused on the issue of required jury determination of questions of fact from among disputed, pleaded facts, concerning occasions of privilege, in accordance with *White v. Nicholls, supra.*

30. On February 10, 1994, the Virginia Court summarily denied Petitioner's *Motion for Extension of Time to File Complete Petition for Rehearing Brief*, without stated reason or comment.

31. On February 24, 1994, Petitioner filed *Petition to Rehear Motion for Extension of Time to File Complete Rehearing Brief*, citing *Coleman v. Thompson*, — U.S.—, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), and claiming the extension of time provision related to constitutional questions, as set forth in the notes to Rule 5:5 of the *Rules of the Supreme Court of Virginia*, at page 168.

32. On February 25, 1994, the Virginia Court summarily denied Petitioner's *Preliminary Petition for Rehearing*, without stated reason or comment. See Appendix Exhibit 6, at page A10.

33. On March 8, 1994, the Virginia Court summarily denied Petitioner's *Petition to Rehear Motion for Extension of Time to File Complete Petition for Rehearing Brief*, without stated reason or comment (see Appendix Exhibit 7, at page A11) and, thereby, refused to accept or to hear Petitioner's complete Petition for Rehearing brief which focused on the issue of required jury determination of questions of fact on alleged occasions of privilege, in accordance with *White v. Nicholls, supra.*

Constitutional Issues Raised by Virginia Court Action—

34. The Virginia Supreme Court's (a) refusal of Petitioner's *Petition for Appeal*, (b) denial of Petitioner's *Preliminary Petition for Rehearing*, and (c) refusal to extend time or to accept Petitioner's complete *petition for rehearing* brief denies Petitioner his Constitutional rights, as follows:

a. Under the *Due Process Clauses* of the Fourteenth Amendment of the United States Constitution and article I, § 11, of the Virginia Constitution, the construction and meaning of those clauses is that due process—the right to timely notice and adequate opportunity to be heard before an impartial tribunal, prior to being deprived of a significant property interest—includes the right to have questions of fact submitted to a jury, when Petitioner submitted *evidence* as to the liens attached to the *Motion for Judgment*, which would warrant a jury in finding a verdict in accordance therewith, and when the Petitioner's circumstances place him in the position that warrants factual determination concerning disputed, pleaded, facts as to (1) whether these documents entitled "memorandum of mechanics' lien" and "certificate of partial release of mechanics' lien"—pleaded as being sham—were mechanics' liens or whether they were sham liens and *whether the occasions of their filing were occasions of privilege;* (2) whether words were used *bona fide*; and (3) whether malice, as pleaded, marked the publication in the public records, of the documents entitled "memorandum of mechanics' lien" and "certificate of partial release of mechanics' lien" and, thereby, defeats any absolute privilege normally associated with those occasions. That is, whether the disputed questions of fact must be submitted to a jury for *sole* determination by that jury, in accordance with this Court's holding in *White v. Nicholls, supra*, or whether a trial judge may rule, both in fact and in law, upon disputed facts to dismiss the defamation actions upon plea of absolute privilege?

b. Under the *Equal Protection Clause* of the Fourteenth Amendment of the United States Constitution and article I, § 11, of the Virginia Constitution, the construction and meaning of those clauses is that equal protection under law includes having the

supreme law of the land, as propounded in *White v. Nicholls, supra,* apply to Petitioner, if his factual circumstances so warrant.

c. Under the *Civil Trial by Jury Clauses* of the Seventh Amendment of the United States Constitution and article I, § 11, of the Virginia Constitution, the construction and meaning of those clauses is that when the underlying action is a controversy respecting property and when it is a suit between man and man and, particularly when it involves required determinations by jury of questions of fact, in accordance with *White v. Nicholls, supra,* the Petitioner is entitled to jury trial of those questions of fact, particularly when several of the actions are for common-law defamation of name and reputation seeking damages, including punitive damages, in accordance with *Stanardsville Volunteer Fire Co. v. Berry, supra; O'Brien v. Snow, supra; Speet v. Bacaj, supra;* and *Edlow v. Arnold, supra.*

REASONS FOR GRANTING THE WRIT

I. *Certiorari Should Be Granted Because this Case is the Ideal Factual Situation for this Court to Hear the Issues of Due Process, Equal Protection under Law, Deprivation of Liberty Interest, as well as of Property Interest, and Abuse of Absolute Privilege, as Regards Mechanics' Liens, and to Apply the* Connecticut v. Doehr *holdings for Prejudgment Attachments to Mechanics' Liens, Providing Guidance to 50 States and the District of Columbia—*

1. In light of the tests of sufficiency of Due Process protection set forth in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) and, most recently, *Connecticut v. Doehr, supra,* (1991):

a. The Virginia mechanics' lien statutes, as applied herein, are repugnant to the Due Process Clause of the Fourteenth Amend-

ment of the United States Constitution and of Article I, § 11, of the Virginia Constitution.

b. The Virginia judicial procedure for redress of libelous mechanics' liens, embodied in *Donohoe Constr. Co. v. Mount Vernon Assoc., supra*, in its application herein, is repugnant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution and is repugnant to the Civil Trial by Jury Clauses of the Seventh Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution.

c. The mechanics' lien statutes of Virginia and most of the 50 states and the District of Columbia are in motley disarray and, in **almost every state's instance, do not satisfy the Due Process Clause of the Constitution of the United States,** as it has been interpreted by this Court. See Petitioner's *Due Process Analysis of Mechanics' Lien Laws of the 50 States and District of Columbia*, at Appendix Exhibit 25, at pages A53 *et seq.*).

2. a. The strongest argument for this Court selecting this *petition* to grant *writ of certiorari*, full argument, and full opinion is the opportunity this *petition* presents the United States Supreme Court to provide guidance, regarding mechanics' liens, their due process requirements, and procedures for redress, to the 50 states and the District of Columbia *now*, not decades from now.

b. Very few mechanics' lien cases are going to rise to the United States Supreme Court's level, due to the large costs involved for litigation versus the prospective benefits for the mechanics' lien being litigated. Only rare projects would be such magnitude as to have six-figure liens for 150 days' work, lienable in Virginia, and, thus, be large enough to justify the hugh costs involved to pursue appeal to this Court. Another case presenting the opportunity which this *petition* presents may not surface during the next 50 years.

c. Further, this instant *petition* is an ideal set of circumstances for review of the Virginia mechanics' lien law's constitutionality, as that law is applied herein; everything which could

possibly be wrong with these mechanics' liens is wrong, and a lower court has twice adjudicated on the merits the liens' invalidity, making their glaring defects *res judicata.*

3. In *Connecticut v. Doehr, supra,* (1991), this Court held a set of seven requirements concerning prejudgment attachments. These may be used as a judicial test of the constitutionality of mechanics' lien statutes in general and the Virginia mechanics' lien statutes, as applied herein, in particular. And, as measured against the requirements of *Connecticut v. Doehr,* **the Virginia mechanics' lien law, as applied herein, (and the mechanics' lien statutes of almost every other state) fail to satisfy the necessary safeguards to ensure the constitutional right of due process is protected to the lienee/property owner,** when he is deprived of a significant property interest by a mechanics' lien. The seven requirements of *Connecticut v. Doehr, supra,* are summarized in the reporter of decision's summary of the 115 Lawyers Edition, 2d, at page 2 (see Appendix Exhibit 18, at pages A44-A45).

4. a. In *Mathews v. Eldridge, supra,* cited with approval in *Doehr, supra,* this Court set forth a three-part judicial test for adequacy of due process protection:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or subsititute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge, id.*, at 33, *id.*, at 334-335.]

b. As measured against the three-part judicial test of *Mathews v. Eldridge, supra,* **the Virginia mechanics' lien law, as applied herein, (and the mechanics' lien statutes of almost every other state) fail to satisfy the necessary specific dictates of due process,** as currently interpreted.

5. a. Questions of *two* constitutionally-protected interests are involved: a property interest and a liberty interest. The two documents, entitled "memorandum of mechanics' lien" and one "certificate of partial release of mechanics' lien," were filed without notice and without predeprivation hearing, thus without Due Process to the lienee/property owner, and deprived the lienee/property owner of *two significant* constitutionally-protected interests: (1) as a lien, by invading his property interest, and (2) as a libelous lien, employed as ancillary process, by invading his liberty interest.

b. The November 27, 1991, and January 14, 1992, documents entitled "mechanics' liens," were filed in the false, fictitious, *feigned* claimant name of a person not in life, false claimant address, for false amount, with perjured oath and forged signature, and deprived Petitioner of a significant property interest. Thus, the first part of the *Mathews v. Eldridge, supra*, test regarding Due Process is satisfied. The false May 7, 1992, mechanics' lien was filed against Petitioner as named lienee, although Petitioner was no longer the property owner of record, and deprived the Petitioner, as *lienee*, of a constitutionally-protected interest: by a libelous mechanics' lien invading Petitioner's liberty interest. The liberty interest which was invaded is *significant*: the liens libeled Petitioner's good name, reputation, and creditworthiness to which he is *entitled* under both the federal and state constitutions.

c. Previous federal due process cases, regarding liens, attachments, and other provisional remedies, have turned on questions of the property interest being invaded. In the instant petition, another equally important protected interest—the liberty interest—is invaded also. Thus, Petitioner claims the construction and meaning of the Due Process Clause makes it applicable also to situations where the lienee's liberty interest is invaded (whether he be the property owner at that moment of lien or not) by a false, libelous lien which names him improperly as lienee.

d. Thus, a dichotomy of effect is produced by such lien: the lienee is libeled by a false, unlawful lien, invading his liberty interest, and the actual property owner is deprived of a significant property interest as his property is subjected to lien improperly.

e. Finally, and importantly, *if the Virginia judicial procedure for redress of libelous mechanics' liens is unconstitutional*, as it appears to be, how is the libeled lienee—whose name is defamed—and/or property owner—whose title is slandered—to have redress for the damage he or they suffered?

6. The Petitioner was not accorded due process in the instant underlying action because "[D]ue Process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." [*Sniadach v. Family Finance Corp., supra*, cited with approval in *Fuentes v. Shevin, id.*, at 579.] In the instant action underlying this *petition for certiorari*, the underlying claim—that the Petitioner, as lienee of two mechanics' liens, was "justly indebted" to the claimant lienor—a false, *feigned*, fictitious, not-in-life person—was *untrue*.

7. The risk of erroneous deprivation of constitutionally-protected interests through the procedures provided in the Virginia mechanics' lien statutes was substantial, as demonstrated herein, and the probable value of additional or substitute procedural safeguards included in the Virginia mechanics' lien statutes, as applied herein, was insufficient to mitigate that risk. Thus, the Virginia mechanics' lien statutes, as applied herein, fail the second part of the *Mathews v. Eldridge, supra*, test.

8. The *postdeprivation* safeguards which the Virginia mechanics' lien statutes afford are insufficient and do not adequately reduce the risk of erroneous deprivation. In fact, in the instant May 7th lien, the burden of the erroneous, false, malicious deprivation fell upon an unsuspecting, subsequent owner of the property liened. The Virginia mechanics' lien law, as applied herein, does not provide adequate provisions for safeguarding Due Process. Virginia's mechanics' lien law may be compared with the other 49 states and District of Columbia in Petitioner's *Due Process Analysis of Mechanics' Lien Laws of the 50 States and District of Columbia*, at Appendix Exhibit 25, at pages A53 *et seq*. Particularly lacking in the Virginia mechanics' lien law are the following safeguards

(identified from *Connecticut v. Doehr, supra*, which match with the columns of the *Analysis*):

a. The law does not provide for prior notice of intent to lien;

b. The law does not provide for a *predeprivation* hearing;

c. The law does not provide for notice of a lien's filing to be served upon the property owner concurrently with the lien's filing;

d. The law deprives an owner of the unrestricted use and full enjoyment of his property for an unreasonably long time. From the date the lien is filed, the lienor has six months in which to bring suit to enforce the lien; to that six months, add the time to adjudicate the suit to enforce the lien—during all of which time period the lienee/owner cannot free his property from the effects of that mechanics' lien, except by bringing a *Virginia Code §43-17.1* suit on the lien's validity, at substantial cost to himself.

e. The law does not provide for an early *postdeprivation* hearing. Although the Virginia mechanics' lien law does provide for a validity hearing, in accordance with *Virginia Code §43-17.1*, the hearing is actually on the *invalidity* of the lien, with the burden of proof actually falling upon the lienee/owner. The property owner can only challenge the lien in a *§43-17.1* chancery suit, after any dilatory tactics of the lienor, and in the normal course of the trial court's docket. Under *Virginia Code §43-17.1*, only a person with interest in the property has standing to bring a *§43-17.1* suit. A named lienee, who is not the property owner, does not have access to this form of redress—to have the lien removed from record—to restore his libeled name and reputation.

f. The law does not provide a requirement that the lienor post a bond to protect the lienee against damages resulting from erroneous deprivation by erroneous, false, or fraudulent lien. There is no adequate, economically-feasible method for redress for damages suffered by lienee as a result of erroneous, or fraudulent, or libelous liens, *particularly if the Virginia judicial procedure for redress be unconstitutional.*

g. The law does not provide that the property owner may free his property from the lien by posting a bond. Even had "release by bond" been available by statute, a 200% cash-collateral security would be required for a bonding surety to issue a 100% bond to cover the risk of a mechanics' lien (according to a bonding surety with whom the Petitioner discussed the problem). Thus, the cash collateral required would have been $103,536.18, plus about $12,500 (non-returnable) for bond fees, to release the false $51,768.09 November 27, 1991 mechanics' lien. Such supposed avenue of release is merely another extortionary coercion.

h. The law does not provide that the lien be issued under the supervision of a judge but, rather, provides that the recording of the lien is a ministerial function of a clerical employee in the Office of the Clerk of the Circuit Court, who admits the lien to record by endorsing the lien memorandum with the official *indicia* and attestation of the Clerk, and the date of filing.

i. The law does not provide that the lien *affidavit* contain sufficient substantive facts underlying conclusory allegations of the debt alleged, on which a judge could make a meaningful determination, even if such judge were to see the *memorandum of lien* prior to the lien attaching.

9. a. The state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural Due Process requirement would entail, does not outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests.

b. The interests in favor of an *ex parte* attachment of the lien are too minimal to diminish the need for a *predeprivation* hearing, especially as the Petitioner (1) was and is an in-state resident, (2) was an owner of the liened property, and therefore, (3) was servable with notice by sheriff, so that there was no need to attach the *res*—the real property—to obtain jurisdiction over Petitioner. Respondent Phillips brought no action against the new owner in the two liens he placed on the Castile Court property, demonstrating that the Respondents' extortion target was only the Petitioner.

c. The Commonwealth of Virginia may well argue that the interests of the state are substantial in furthering the ability of contractors, mechanics, and materialmen to collect amounts due to them, and that the due-process procedure of a predeprivation hearing would interfere with the efficient operation of these statutory lien procedures. But such argument is not well founded, as predeprivation hearings currently work well under the state law of Hawaii and Maryland. This Court has stated:

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken." [*Fuentes v. Shevin, supra,* and *Parham v. Cortese,* 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972)]

d. If there is to be a judicial hearing on mechanics' liens, either in Virginia's General District or Circuit Courts, the cost burden can be shouldered by court fees and costs, taxed as appropriate.

e. There were no exigent circumstances shown or present on the date the liens were filed which would have mandated the need to by-pass a *predeprivation* hearing. Thus, the Virginia mechanics' lien statutes, as applied herein, fail the third part of the *Mathews v. Eldridge, supra,* test.

10. Regardless of the Due Process violations by the Virginia mechanics' lien law, as applied herein, **this *petition* is primarily about redress for damages** occasioned when the "erroneous deprivation" happens to an actual citizen and, particularly, when that deprivation of the citizen's rights takes the form of libel of his name and reputation and slander of his property title, occasioned, not by a merely-erroneous deprivation, but by a false, fraudulent, malicious, without-probable-cause deprivation by sham mechanics' liens comprising fraud on the court as well as fraud upon the lienee/property owner. Previous Due Process cases have not addressed this *post-deprivation* dimension of the issue thoroughly, not for liens, prejudgment attachments, garnishments, or other provisional remedies.

11. This case is about the *inadequacy* and *unconstitutionality*

of Virginia statutory and judicial procedures for redress, as set forth in D*onohoe, supra*, and as applied herein, for one harmed by libelous mechanics' liens, particularly those liens which are sham, malicious and without-probable-cause, and frauds on the court.

a. The Virginia judicial procedure for redress for one libeled and defamed by false mechanics' liens is set forth in *Donohoe Constr. Co. v. Mount Vernon Assoc., supra*, which, as applied herein, grants absolute privilege to mechanics' liens, regardless of whether they are sham and regardless of whether the privileged occasion is abused. The *Donohoe* rule, as applied herein, prevents suing in action for defamation under *any* circumstances, in contravention of *White v. Nicholls, supra*. In so doing, **the Virginia judicial procedure established under the *Donohoe* rule, as applied herein, violates the Equal Protection Clauses** and the **Due Process Clauses** of the Fourteenth Amendment of the United States' Constitution and the **Civil Trial by Jury Clauses** of the Seventh Amendment of the United States' Constitution and their counterparts in Article I, § 11, of the Virginia Constitution.

b. Further, the *Donohoe* decision channels action for redress into the procedure of having the liens adjudged invalid in *§43-17.1* chancery suit (to prove favorable termination) then proceeding separately at law for malicious prosecution or abuse of process, providing the English rule be satisfied to maintain those actions.

c. The Petitioner has just demonstrated that route unworkable. After nine months of intense litigation in the malicious prosecution and abuse of process actions in the Circuit Court of Arlington, Virginia, which Petitioner filed to seek redress on these liens (prior to nonsuiting the instant case in Fairfax Circuit Court), the Petitioner was required to file about 1,200 pages of pleadings in response to *extensive* dilatory motions by defendants. Petitioner's actions were dismissed upon third *demurrers*, without leave to amend (despite the fact that Petitioner had pleaded each count properly and each count was well-pleaded, and Petitioner had alleged "seizure of Plaintiff's property," in those words, and alleged special injury, supported by factual allegations). The trial judge in the Arlington Circuit Court found by his *sole* determination from

among disputed pleaded facts, without a jury determination, ruling in fact and in law, that there was no seizure of property occasioned by a mechanics' lien and there was no special injury arising from these mechanics' liens, filed as ancillary process to an action in debt. This trial judge made his determination acting *solely* on his own finding of fact, without a jury determination of questions of fact from among disputed pleaded facts and held that a mechanics' lien does not satisfy the English rule of arrest of the person, seizure of property, or special injury, which is necessary to maintain actions for malicious prosecution or abuse of process.

12. A fundamental reason to select this *petition* to grant *writ of certiorari*, full argument, and full opinion is to correct the intolerable public policy situation exemplifed by the shabby treatment accorded Petitioner. Petitioner has been wronged, harmed, and ruined financially, by false, libelous mechanics' liens, which have been adjudicated unlawful, which arise under statutes, applied unconstitutionally, which were filed without Due Process, and which liens are exempted from any form of redress by Virginia judicial procedures, applied unconstitutionally, which violate the Petitioner's federal civil rights protected under the United States' Constitution and 28 USC §1983, and Petitioner's state rights protected under the Constitution of Virginia, and, in particular, which causes of action have been prevented by two trial judges, in two separate cases, from reaching juries where the expected outrage of the citizenry, at the treatment of one of its own, would become manifest.

II. *Certiorari Should be Granted to Resolve Conflicts in Principles of Law Between the Virginia Supreme Court, on the one hand, and Stare Decisis of the United States Supreme Court, the Supreme Courts of Missouri, Massachusetts, West Virginia, and Connecticut, on the other hand.*

A. **The Virginia Court's Refusal of the *Petition for Appeal* Places the Virginia Court in Opposition to the United States Supreme Court on the Same Principle of Law—**

1. By its January 13, 1994, refusal to hear Petitioner's *Petition for Appeal*, and by its denial of the *Petition for Rehearing*,

which pleaded this very issue to the Virginia Court, the Virginia Court has rendered a decision in the underlying *Petition for Appeal* which places the Virginia Court in exact opposition to a decision in 1845 by the United States Supreme Court on the same principles of law, held in *White v. Nicholls, et al., supra*, and thereby deprives Petitioner of *equal protection under law* and *of civil trial by jury.*

2. a. This question, of what constitutes an occasion of privilege under *White v. Nicholls, supra*, how disputed facts concerning that occasion are to be resolved, and whether privilege was abused, first surfaced at the trial court level, in Petitioner's *Memorandum in Opposition to Defendants' Motion for Demurrer*, dated October 23, 1992 (see excerpt at Appendix Exhibit 12, at pages A25-A26).

b. This issue was phrased as a question for judicial resolution by the trial court in *Plaintiff's Petition to Rehear*, dated June 2, 1993 (see excerpt at Appendix Exhibit 13, at pages A27-A28) and was definitized and argued in *Plaintiff's Memorandum in Support of Plaintiff's Petition to Rehear*, dated June 2, 1993 (see excerpt at Appendix Exhibit 14, at pages A29-A33).

c. This question was restated and argued in Petitioner's *Petition for Appeal*, to the Virginia Supreme Court, dated August 6, 1993 (see excerpt at Appendix Exhibit 15, at pages A34-A35).

d. The federal question of the denial of Petitioner's Constitutional rights of Due Process and Equal Protection were raised at the appeals level in Petitioner's *Petition for Appeal*, dated August 6, 1993 (see excerpt at Appendix Exhibit 15, at pages A34-A35).

e. The issues of *Laun v. Union Electric Co. of Missouri, supra*, and the issue of privilege applying only to parties and pleaders to the occasion were argued in Petitioner's *Preliminary Petition for Rehearing*, dated January 27, 1994, (see excerpt at Appendix Exhibit 16, at pages A36-A38) and in Petitioner's complete, replacement rehearing brief, entitled, *Supplement to Petition for Rehearing*, dated February 8, 1994 (see excerpt at Appendix Exhibit 17, at pages A39-A43).

3. *White v. Nicholls, et al., supra*, the governing case by this Court, unchanged for 149 years, mandates to the Plaintiff the right to have a jury, *and only a jury*, make determinations concerning disputed questions of fact in the libelous publications, as follows:

a. The *jury*, properly instructed, must determine—from among the disputed facts—those facts which constitute the documents as being an occasion belonging to one of the four subclasses of privileged communications (upon which facts the court would then rule in law as to the nature of the occasion and the privilege to be accorded to the parties thereto).

b. Depending on the subclass to which the documents are found to belong, the *jury* must determine (1) whether there was an abuse of privilege associated with an occasion of absolute privilege sufficient to render the publications actionable, (2) whether words were used *bona fide*, and (3) whether malice did or did not mark these publications. See quotes from *White v. Nicholls, supra*, at Appendix Exhibit 19, at page A45.

4. Thus, *White v. Nicholls, supra*, makes clear the particular circumstances by which the trial court violated, and the Virginia Court denied, Petitioner's Constitutional guarantee of equal protection under law, which includes having the holding of *White v. Nicholls, supra*, apply equally to Petitioner in this underlying action. And, as Due Process requires an opportunity to be heard, the construction and meaning of the Due Process and Civil Trial by Jury Clauses also requires a jury, not a judge, for determination of questions of fact when *White v. Nicholls, supra*, so mandates.

5. It is impossible to understand the paradox of the Virginia Court's decision on the underlying *Petition for Appeal* versus the *Alexandria Gazette Corp. v. West*, 198 Va. 154, 93 S.E.2d 274 (1956), decision wherein the same Virginia Court stated:

> "Privileged communications are of two kinds, those absolutely privileged and those qualifiedly privileged, and an absolutely privileged communication is one for which an action will not lie, **unless there has been an abuse of the**

privilege. Penick v. Ratcliff, 149 Va. 618, 636, 140 S.E. 664; 12 M.J., Libel and Slander, § 18, page 59." [*bold emphasis added by Plaintiff to Alexandria Gazette v. West, id., at 279.*]

6. That the Virginia Court could find no abuse (as recognized by this Court in *White v. Nicholls, supra,* and as defined in *Howard v. Rawson and Pugh, supra,* and *Pates v. St. Clair, supra*) of the privilege which the Virginia Court granted to mechanics' liens in *Donohoe*, in the two documents entitled "memorandum of mechanics' lien," filed in false, *feigned* claimant name, and one "certificate of partial release of mechanics' lien," boggles the mind. It is reasonable to conclude that frauds upon the court—which these mechanics' liens are, and which Petitioner has alleged—are an abuse of privilege and are within the holdings of *White v. Nicholls, supra* and of *Alexandria Gazette v. West, supra.*

B. **The Virginia Court's Refusal of the *Petition for Appeal* Places the Virginia Court in Opposition to the Supreme Court of Missouri on the Same Principle of Law—**

1. By its January 13, 1994, refusal to hear Petitioner's *Petition for Appeal,* and by its denial of Petitioner's *Petition for Rehearing,* which pleaded this very issue to the Virginia Court, the Virginia Court has rendered a decision in the underlying *Petition for Appeal* which places the Virginia Court in exact opposition to a decision in 1942 by the Supreme Court of Missouri on the same basic principle of law, held in *Laun v. Union Electric Co. of Missouri,* (see *Laun* quotes in Appendix Exhibit 20, at pages A46):

2. This federal question—of inconsistencies between state supreme courts—was first raised at the appeals level, in Petitioner's *Preliminary Petition for Rehearing,* dated January 27, 1994, (see excerpt at Appendix Exhibit 16, at pages A36-A38) and in Petitioner's complete, replacement rehearing brief, entitled, *Supplement to Petition for Rehearing,* dated February 8, 1994 (see excerpt at Appendix Exhibit 17, at pages A39-A43).

3. The factual circumstances of the underlying *Petition for Appeal* are virtually identical with the circumstances of *Laun v.*

Union Electric, quoted in Appendix Exhibit 20, at pages A46-A47, that is, the Respondents did not point out or even say that there were any cogent reasons of public policy compelling the application or extension of absolute privilege to them. The Respondents simply stood on the proposition that the publication complained of was the filing of two mechanics' liens and a partial release in the public records of the Circuit Courts of Arlington and Prince William Counties, Virginia—those were the three occasions—and being so were privileged occasions—according to *Donohoe, supra*—affording a complete defense to all and sundry who might be charged (whether parties to the mechanics' liens and partial release or not) with defamation, conspiring to defame, and with procuring another to publish defamatory matter on a privileged occasion or in such a manner that the actual publisher is immune from liability.

4. Had the holding of *Laun v. Union Electric, supra*, been applied to the underlying *Petition for Appeal*, the result would have been a ruling that some or all of the Respondents may not take advantage of the privileged occasions because they were not in character as parties or pleaders to those privileged occasions. None of the Respondents within the instant *petition* is *Dennis Anderson*, the false, unregistered fictitious, *feigned* name in which the November 27, 1991, and January 14, 1992, mechanics' liens were signed and sworn to, and in which claimant name they were filed by Respondent Phillips, whose name (Phillips) does not appear anywhere on those two mechanics' liens. Thus, by its decision in the instant action, the Virginia Court has ruled, that persons—the Respondents—who stood in character neither as parties nor as pleaders to the privileged occasion or instance of each mechanics' lien, and the dubious occasion of a partial release, were entitled to assert the claim of absolute privilege associated therewith. This decision contravenes the holding of *Laun V. Union Electric Co., supra.*

5. Such decision by the Virginia Court on a basic principle of law—a principle of law not arising from Virginia statutory law and, therefore, peculiar to Virginia as a sovereign state—in direct opposition to a previous decision on the same principle of law by the Missouri Supreme Court, creates a circumstance where a decided principle of law is made uncertain.

C. **The Virginia Court's Refusal to Accept Petitioner's Complete Rehearing Brief Also Places the Virginia Court in Opposition to the Supreme Courts of Massachusetts and West Virginia on Decided Principles of Law—**

1. The Virginia Court refused Petitioner's *Petition for Appeal*, citing no trial court error. By this ruling, the Virginia Supreme Court applied to the Petitioner seven principles of law for Virginia, in opposition to the *stare decisis* of other supreme courts. See Appendix Exhibit 24, at pages A50-A51, for these seven principles of law and the *stare decisis* contravened.

2. So, the Virginia Court has denied the Petitioner the Equal Protection of law and has abridged Petitioner's rights as a United States citizen. As the Virginia Court has refused to act, it is now the obligation of this Court to enforce the constitutional commands in *this* particular instance, in accordance with *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (Mo., 1948) (see quotes from *Shelley v. Kraemer, supra*, at Appendix Exhibit 23, at page A49).

D. **The Virginia Supreme Court's Denial of the Petitioner's *Motion for Extension of Time to File Complete Petition for Rehearing* Violates Petitioner's Constitutional Rights and Invokes the Constitutional Extension of Time Provision—**

1. The denial of Petitioner's Constitutional rights, particularly his right to jury determination of questions of fact, invokes the provisions of *Coleman v. Thompson*, — U.S.—, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), as that precedent is cited in the notes to Rule 5:5, at page 168, of the *Rules of the Supreme Court of Virginia*, that the Virginia Court extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard. Petitioner pleaded such a right, in that his Constitutional rights to due process, equal protection under law, and jury determination of questions of fact, had been denied by the trial court.

3. The primary difference in substance between the Petitioner's *Preliminary Petition for Rehearing*, filed January 27, 1994, and his *Supplement to Petition for Rehearing*, filed February

8, 1994, (which the Virginia Supreme Court refused to accept into judicial notice) is that **the latter document pleads by fact and by the legal authority of *White v. Nicholls, supra*, the denial of Petitioner's Constitutional rights to jury determination of questions of fact**, which Petitioner states are encompassed by the construction and meaning of the Equal Protection and Civil Trial by Jury Clauses of the United States and Virginia Constitutions.

4. The Virginia Court's denial to Petitioner of an extension of time and refusal to accept Petitioner's *Supplement to Petition for Rehearing*, filed February 8, 1994, is arbitrary and capricious and ignores consideration of *force majeure* circumstances.

5. None of the four unpublished rulings of the Virginia Supreme Court in the instant case bear the signature of a justice or any other attribution to a justice. See Appendix Exhibits 4 – 7, at pages A8-A11.

THE QUESTIONS PRESENTED ARE NOT MOOT

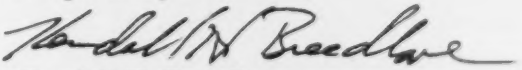
Any argument that the questions presented by Petitioner's *Petition for Writ of Certiorari* are now moot is not valid. Petitioner's 10 counts of defamation were dismissed by the Fairfax Circuit Court, without leave to amend, and Petitioner subsequently nonsuited voluntarily the remaining two amended conspiracy counts of *Breedlove v. Phillips, et al., supra*, on July 16, 1993.

Upon favorable decision on these instant matters, this Court is asked to reverse the judgment of the trial court, and thus overrule the Respondents' *Demurrer*; to vacate the judgment of the Virginia Supreme Court; and to remand the 10 defamation counts of the underlying action to the trial court, the Circuit Court of Fairfax County, Virginia, for trial upon the merits, with proper guidance from this Court on relevant issues of law. Upon a remand, the 10 defamation counts would be viable causes of action.

CONCLUSION

WHEREFORE, Petitioner prays that a *Writ of Certiorari* issue from this Court to review the judgments of the Supreme Court of Virginia in *Breedlove v. Phillips, et al.*, record no. 931104. In the event this *Petition* is granted, Petitioner prays that this Court select this *petition* for full argument and opinion to settle the issues of constitutional due process, equal protection, abuse of absolute privilege, and jury determination of questions of fact, when mandated by the Supreme Court, as those issues apply to mechanics' liens herein, to provide guidance to the judiciaries and legislatures of the governments of the 50 states and District of Columbia; that absolute privilege be held not to apply to the occasions and documents complained of and that the Respondents may not assert the defense of privilege; that the Virginia Supreme Court's judgment be vacated and the trial court's judgment be reversed and the cause be remanded to the trial court for trial upon the merits, with jury; that the Virginia mechanics' lien statutes, as applied herein, be held violative of the Due Process Clauses of the 14th Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution; that the Virginia judicial procedure for redress of false, libelous mechanics' liens, as set forth in *Donohoe, supra*, by its application herein, be held violative of the Equal Protection, the Due Process, and the Civil Trial by Jury Clauses of the 14th and 7th Amendments of the United States Constitution and Article I, § 11, of the Virginia Constitution; if there be found any deficiencies in Petitioner's pleadings, Petitioner prays leave to amend his pleadings; together with such other and further relief as may seem proper to this Court.

Respectfully submitted,



Kendall H. Breedlove, *pro se*
2831 Gallows Road, Suite 145
Falls Church, Virginia 22042

CERTIFICATE OF SERVICE

SS:
COMMONWEALTH OF VIRGINIA
County of Fairfax, to-wit:

KENDALL H. BREEDLOVE, being first duly sworn, upon his oath deposes and says that he is a Petitioner filing *pro se*, in this cause, and that on this 26th day of May, 1994, pursuant to Rule 29.5 (c) of the Supreme Court Rules, he mailed three copies of the ***Petition for Writ of Certiorari*** by first-class mail, postage prepaid, addressed to each of the Respondents, or their counsel, as follows:

Mr. Calvin W. Phillips, *pro se*,
Respondent,
310 Maple Avenue West
Suite 198
Vienna, Virginia 22180; and

Mr. J. Charles Curran, attorney of record for
Respondents Joyce E. Horton and James H. Horton,
Kidwell, Kent & Curran
9695-C Main Street
Fairfax, VA 22031; and

Pursuant to Rule 29.4 (c), citing that 28 USC §2403 (b) may be applicable, he mailed three copies of the ***Petition for Writ of Certiorari*** by certified mail, postage prepaid, addressed as follows:

The Honorable Stephen D. Rosenthal
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 8th Street
Richmond, Virginia 23219

_____
Kendall H. Breedlove, *pro se*

SUBSCRIBED AND SWORN TO before me on 26th of May, 1994.

_____
Notary Public

My commission expires: _____

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APPENDICES TO

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, *et al.*,

Respondents

PETITION FOR WRIT OF CERTIORARI

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Exhibit 1 (Trial court ruling on *demurrer*, being appealed)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KENDALL H. BREEDLOVE Plaintiff,	:	
v.	:	AT LAW NO. 117967
CALVIN W. PHILLIPS, et al, Defendants.	:	

ORDER

THIS CAUSE came on to be heard this 30th of October, 1992, pursuant to notice, upon the Defendants' Demurrer, Motion for Sanctions, and Motion for Protective Order, and was argued.

IT APPEARING TO THE COURT that the terms of this Order are proper, and it ought to be entered; it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Demurrer *to Counts 1 – 10 of the Motion for Judgment* is sustained, without leave to amend. *The Demurrer to Counts 11 and 12 is granted, with 21 days leave to amend if Plaintiff elects to do so.*

2. The Motion for Sanctions is *denied at this time, without prejudice to renew the motion at the conclusion of the case.*

3. *The Protective Order is granted and the Defendants need not respond to the discovery until further order of this court, or until the parties are at issue, whichever comes first.*

AND this cause is continued.

ENTERED this 30th day of October, 1992.

/s/ Quinlan H. Hancock
JUDGE

Exhibit 1, continued

SEEN AND OBJECTED AS TO THE LEAVE TO AMEND COUNTS 11 AND 12, AND THE DENIAL OF SANCTIONS AT THIS TIME:
SEEN AND AGREED AS TO THE REMAINING ISSUES:

DIXON, SMITH & STAHL

By: */s/ James R. Hart*
James R. Hart, VSB #23277
4122 Leonard Drive
Fairfax, Virginia 22030
(703) 691-0770
Counsel for Defendants

SEEN: *AND OBJECTED TO:*

/s/ Kendall H. Breedlove
Kendall Harold Breedlove, pro se
8149 Larkin Lane
Vienna, VA 22182

Exhibit 2 (Trial court letter opinion ruling on rehearing)
NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

July 5, 1993

Kendall H. Breedlove
2831 Gallows Road, Suite 145
Falls Church, Virginia 22042

J. Charles Curran, Esq.
9695-C Main Street
Fairfax, Virginia 22031

Re: *Breedlove v. Phillips, et al.*
At Law No. 117967

Gentlemen:

The Court has reviewed Plaintiff's Petition to Rehear, filed on June 8, 1993, in which he asks this Court to reconsider its October 30, 1992 ruling granting Defendants' demurrer to Counts I through X, with prejudice, and Counts XI and XII, with leave to amend.

Upon careful consideration of all of the arguments raised in Plaintiff's memorandum, as well as a review of the applicable law in this area, this Court denies Plaintiff's petition.

Mr. Curran should prepare an appropriate order reflecting this ruling, and send it to Mr. Breedlove for approval as to form, preserving all objections.

Very truly yours,

/s/ Quinlan H. Hancock
Quinlan H. Hancock

QHH/bjl

Exhibit 3 (Final order by trial court)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KENDALL H. BREEDLOVE Plaintiff,	)	
v.	)	AT LAW NO. 117967
CALVIN PHILLIPS, et al, Defendants.	)	

ORDER

THIS CAUSE came on upon the Plaintiff's Petition To Rehear filed June 8, 1993, and

IT APPEARING TO THE COURT upon consideration of all arguments raised in Plaintiff's Memorandum and the applicable law that Plaintiff's Petition To Rehear ought to be denied, * it is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff's Petiton To Rehear should be, and it hereby is, denied, and

THIS ORDER IS FINAL.

Entered this *17th* day of *September*, 1993.

/s/ Quinlan H. Hancock
Quinlan H. Hancock, Judge

* *as stated in the Court's letter opinion dated July 5, 1993 attached hereto and made a part thereof.*

Exhibit 3, continued

WE ASK FOR THIS:

/s/ J. Charles Curran
J. Charles Curran
Virginia Bar No. 21455
KIDWELL, KENT & SULLIVAN
Woodson Square
9695 C Main Street
Fairfax, Virginia 22031
(703) 764-0600

Noticed but not present
John K. Bancroft, Esquire
Guardian Ad Litem
P.O. Box 36
Fairfax, Virginia 22030

SEEN AND OBJECTED: *To as incompletely incorporating the objections and incidents of trial set forth in "Plaintiff s Memorandum in Opposition to Entry of Order," filed September 10, 1993, and incorporated herein by reference.*

/s/ Kendall H. Breedlove
Kendall H. Breedlove
Plaintiff Pro Se
2831 Gallows Road
Suite 145
Falls Church, Virginia 22042

Exhibit 4
(Virginia Supreme Court ruling on appeal)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 13th *day of* January, 1994.

Kendall H. Breedlove, Appellant,

against Record No. 931104
Circuit Court No. L-117967

Calvin W. Phillips, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal. The motion to dismiss filed by appellees Joyce E. Horton and James H. Horton and the appellant's motion to strike the brief in opposition are hereby denied.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ *J. J* ...(illegible)

Deputy Clerk

[*Petitioner's Note: The ruling bears no signature of a justice or other attribution to a justice.*]

Exhibit 5
(Virginia Supreme Court refusal of complete rehearing brief)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 10th *day of* February, 1994.

Kendall H. Breedlove, Appellant,

against Record No. 931104
Circuit Court No. L-117967

Calvin W. Phillips, et al., Appellees.

Upon a Petition for Rehearing

On January 31, 1994 came Kendall H. Breedlove, in proper person, and filed a "Motion for Extension of Time to File Complete Petition for Rehearing Brief."

On consideration whereof, the motion is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

[*Petitioner's Note: The ruling bears no signature of a justice or other attribution to a justice.*]

Exhibit 6
(Virginia Supreme Court denial of rehearing)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 25th *day of* February, 1994.

Kendall H. Breedlove, Appellant,

against Record No. 931104
Circuit Court No. L-117967

Calvin W. Phillips, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the preliminary petition of the appellant, which is treated a [*sic]* a petition to set aside the judgment rendered herein on the 13th day of Fanuary, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

[*Petitioner's Note: The ruling bears no signature of a justice or other attribution to a justice.*]

Exhibit 7
(Virginia Supreme Court denial of rehearing on extension of time to accept complete rehearing brief)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 8th *day of* March, 1994.

Kendall H. Breedlove, Appellant,

against Record No. 931104
Circuit Court No. L-117967

Calvin W. Phillips, et al., Appellees.

From the Circuit Court of Fairfax County

On February 28, 1994 came Kendall H. Breedlove, in proper person, and filed a "Petition to Rehear Motion for Extension of Time to File Complete Petition for Rehearing Brief."

On consideration whereof, the Court denies the petition.

A Copy,

Teste:

/s/ David B. Beach
Clerk

[*Petitioner's Note: The ruling bears no signature of a justice or other attribution to a justice.*]

Exhibit 8 (February 26, 1993 Order in Arlington Chancery #92-609)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

KENDALL H. BREEDLOVE, Plaintiff	:	
v.	:	In Chancery No. 92-609
CALVIN W. PHILLIPS, aka D. ANDERSON, aka DENNIS ANDERSON, aka LESTER C. McCALL, aka INMATE #89575 and JOYCE E. HORTON, Authorized Agent for Calvin Phillips Defendants	:	In Chancery No. 92-701
CALVIN PHILLIPS, Complainant	:	
v.	:	In Chancery No. 92-532
KENDALL HAROLD BREEDLOVE Defendant	:	

ORDER

In Chancery No. 92-609

This 26th day of February, 1993, came the parties, Defendants by counsel and Plaintiff *pro se*, and argued Plaintiff Breedlove's

Motion for Summary Judgment in this cause (in chancery #92-609), which is a §43-17.1 hearing on the validity of a mechanics' lien filed November 27, 1991, in the land records of Arlington County, Virginia, against property owned by Plaintiff Breedlove, which property was conveyed to Plaintiff by a deed dated August 6, 1990, and recorded in the Clerk's Office of the Circuit Court of Arlington County, in Deed Book 2445 at Page 182, to wit:

> ALL OF Lot 23-A, as thee same is shown on a plat of resubdivision of Lots 23, 24 and 25 of a resubdivision of original Lot 13, of the subdivision of COUNTRY CLUB ESTATES, attached to the deed recorded in Deed Book 532 at Page 189, among the land records of Arlington County, Virginia, comprising approximately 6,334 square feet, more or less.
>
> AND BEING the same property conveyed to Kendall Harold Breedlove by deed from Kendall Harold Breedlove, Substitute Trustee of the Laurah Savage Breedlove Living Trust by deed dated August 6, 1990 and recorded August 17, 1990 in Deed Book 2445 at Page 182 among the land records of Arlington County, Virginia, more commonly known as 2629 North Florida Street, Arlington, VA, 22207, tax ID number 02-057-021.

This memorandum of mechanics' lien, dated November 27, 1991, recorded November 27, 1991, and indexed in the land records of Arlington County, Virginia, in Deed Book 2498, at Page 0755, against the aforesaid real property, was filed by claimant D. Anderson (also referred to as Dennis Anderson in the affidavit section of the memorandum), listing his address as 7010 Brookfield Pl., Springfield, VA. 22150, listing Kendall Harold Breedlove as equitable owner, and reciting in the memorandum $51,768.09 as the amount claimed for work alleged to have been performed on the subject real property.

This memorandum of mechanics' lien, dated November 27, 1991, was released of record by Order of Judge Paul F. Sheridan on January 22, 1993, *in consolidated cases 92-532, 92-609 and 92-701*

ut without ruling explicitly on the initial validity of the November 27, 1991 mechanics' lien. That Order was recorded in the land records of Arlington County, Virginia, in Deed Book 2571, at Page 0285, on January 26, 1993.

ORDERED, ADJUDGED and DECREED that the November 27, 1991 mechanics lien is and was invalid and that Mr. Breedlove is entitled under §43-17.1 to an order removing it from the land records, and that the same has also been accomplished by this court's order of 22 January 1993 in consolidated cases 92-532, 92-609 and 92-701.

FURTHER ORDERED that to the extent that the Defendants argue mootness following the 22 January order, the court finds that Mr. Breedlove is not barred from the relief of a declaration of invalidity. This is made without specific fact findings by the court, which the court cannot do on summary judgment and without hearing evidence.

ADJUDGED, ORDERED and DECREED that a copy of this judgment shall be spread of record by the Clerk in the land records of Arlington County, Virginia, and shall be indexed under the following names:

Grantee:
Kendall H. BREEDLOVE

Grantors: D. ANDERSON;
Dennis ANDERSON;
Calvin W. PHILLIPS:
Calvin PHILLIPS also known as D. ANDERSON;
Joyce E. HORTON, as authorized agent
for Calvin Phillips

ADJUDGED, ORDERED and DECREED that a copy of this Order be filed in the case files for chancery #92-609, chancery #92-701, and chancery #92-532.

FURTHER ORDERED that this order is a final order in chancery 92-609.

AND causes 92-532 and 92-701 are continued.

DATE: *26 February 93*

ENTER: */s/ Paul F. Sheridan*

I ASK FOR THIS:

Kendall H. Breedlove, pro se

SEEN AND EXCEPTED TO: */s/ James R. Hart,* p.d.
James R. Hart VSB #23277
Counsel for Calvin Phillips
and Joyce Horton

as to the ruling of mootness; and with respect to the entitlement of relief without any evidentiary hearing on the issuesof estoppel and unclean hands raised as affirmative defenses in chancery 92-609 and to the "akas" referenced in the caption and the indexing as to Joyce Horton.

Exhibit 9 (April 8, 1993 Order in Arlington Chancery #92-609)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

KENDALL H. BREEDLOVE,	:	
Plaintiff	:	
v.	:	In Chancery No. 92-701
CALVIN W. PHILLIPS, aka D. ANDERSON, aka DENNIS ANDERSON, aka LESTER C. McCALL, aka INMATE #89575	:	
and	:	
JOYCE E. HORTON, Authorized Agentfor Calvin Phillips	:	
Defendants	:	

ORDER

This 8th day of April, 1993, came the parties, Defendants by counsel and Plaintiff *pro se*, and argued (1) Defendant Horton's Demurrer, (2) Plaintiff Breedlove's Motion for Summary Judgment, and (3) Defendants' Cross-Motion for Summary Judgment in this cause, which is a §43-17.1 hearing on the validity of a mechanics' lien contained within the May 22, 1992, Certificate of Partial Release of Mechanics' Lien, recorded May 26, 1992, among the land records of Arlington County, Virginia. The lien within the May 22, 1992, Certificate of Partial Release of Mechanics' Lien claimed under a mechanics' lien, recorded November 27, 1991, against property owned by Plaintiff Breedlove, which property was conveyed to Plaintiff by a deed dated August 6, 1990, and recorded in the Clerk's Office of the Circuit Court of Arlington County, in Deed Book 2445 at Page 182, to wit:

ALL OF Lot 23-A, as the same is shown on a plat of resubdivision of Lots 23, 24 and 25 of a resubdivision of original Lot 13, of the subdivision of COUNTRY CLUB ESTATES, attached to the deed recorded in Deed Book 532 at Page 189, among the land records of Arlington County, Virginia, comprising approximately 6,334 square feet, more or less.

AND BEING the same property conveyed to Kendall Harold Breedlove by deed from Kendall Harold Breedlove, Substitute Trustee of the Laurah Savage Breedlove Living Trust by deed dated August 6, 1990 and recorded August 17, 1990 in Deed Book 2445 at Page 182 among the land records of Arlington County, Virginia, more commonly known as 2629 North Florida Street, Arlington, VA, 22207, tax ID number 02-057-021.

The memorandum of mechanics' lien, dated November 27, 1991, recorded November 27, 1991, among the land records of Arlington County, Virginia, in Deed Book 2498, at Page 0755, against the aforesaid real property, in the claimant name of "D. ANDERSON" (also referred to as Dennis Anderson in the affidavit section of the November 27, 1991 memorandum bearing the signature Dennis Anderson), listing his address as 7010 Brookfield Pl., Springfield, VA, 22150, listing Kendall Harold Breedlove as equitable owner, and reciting in the memorandum $51,768.09 as the amount claimed for work alleged to have been performed on the subject real property.

The May 22, 1992, Certificate of Partial Release of Mechanics' Lien, recorded May 26, 1992, among the land records of Arlington County, Virginia, in Deed Book 2526, at Page 0282, against the aforesaid real property and Kendall Harold Breedlove as owner, was recorded in the claimant name of "Calvin PHILLIPS, also known as D. ANDERSON," and was indexed under the name, "PHILLIPS, Calvin"

The memorandum of mechanics' lien, dated November 27, 1991, and any lien contained within the May 22, 1992, Certificate of

Partial Release of Mechanics' lien, recorded May 26, 1992, were released of record by Order of Judge Paul F. Sheridan on January 22, 1993, in consolidated cases 92-532, 92-609, and 92-701, but without ruling explicitly on the initial validity of the November 27, 1991 mechanics' lien or on the initial validity of any lien within the Certificate of Partial Release of Mechanics' lien, recorded May 26, 1992. That Order was recorded in the land records of Arlington County, Virginia, in Deed Book 2571, at Page 0285, on January 26, 1993.

The memorandum of mechanics' lien, dated November 27, 1991, was adjudged invalid, to-wit, ""**ORDERED, ADJUDGED and DECREED that the November 27, 1991 mechanics' lien is and was invalid and that Mr. Breedlove is entitled under §43-17.1 to an order removing it from the land records,**" by Final Order of Judge Sheridan, dated February 26, 1993, in Chancery #92-609, within the consolidated case. That Order was recorded in the land records of Arlington County, Virginia, in Deed Book 2576, at Page 1408, on February 26, 1993.

The May 22, 1992, Certificate of Partial Release of Mechanics' Lien, recorded May 26, 1992, claimed under the November 27, 1991 mechanics' lien, to-wit: "The claimant still claims a mechanic's lien in the amount of $13,014 with interest from September 11, 1991 on that amount."

The Complainant's suit in chancery #92-532 against Defendant Kendall Harold Breedlove, to enforce the November 27, 1991 mechanics' lien (Count I) and for an alternate contract claim against Breedlove (Count II), was nonsuited by Complainant; Count I was nonsuited in Order of January 22, 1993, within the consolidated case, and Count II was nonsuited prior to Defendant Breedlove's Demurrer being heard, by Order of March 26, 1993, in chancery #92-532, within the consolidated case. The Order of March 26, 1993, continued chancery #92-701.

IT APPEARING TO THE COURT that Defendant Joyce E. Horton's Demurrer ought to be overruled, that Defendants' Cross-Motion For Summary Judgment ought to be overruled, that

Plaintiff's Motion for Summary Judgment ought to be granted in favor of the plaintiff, and that the terms of this Order are proper and it ought to be entered; it is hereby

ORDERED, ADJUDGED, and DECREED that the lien contained within the May 22, 1992, Certificate of Partial Release of Mechanics' Lien, recorded May 26, 1992, is and was invalid and that Mr. Breedlove is entitled under §43-17.1 to an Order removing it from the land records, and said lien is hereby removed.

ORDERED, ADJUDGED, and DECREED that a copy of this Order shall be spread of record by the Clerk in the land records of Arlington County, Virginia, and shall be indexed under the following names:

Grantee:
Kendall H. BREEDLOVE

Grantors: Calvin W. PHILLIPS:
Calvin PHILLIPS also known as D. ANDERSON;
D. ANDERSON;
Dennis ANDERSON;
Joyce E. HORTON, as authorized agent
for Calvin Phillips

AND this cause is ended.

ENTER: */s/ Paul F. Sheridan*

DATE: *8 April 1993*

I ASK FOR THIS:

Kendall H. Breedlove
Plaintiff, *pro se*

SEEN AND EXCEPTED TO: *as to overruling of demurrer; as*
/s/ James R. Hart, p.d. *to all rulings; specifically as to granting of any relief under §43-17.1; and as to finding that the release contains a lien; and as to a/k/as in the caption, and as to the indexing as to Joyce Horton.*

Exhibit 10 (Notice of Appeal)
IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

KENDALL H. BREEDLOVE,	:	
	:	
Plaintiff/Appellant	:	
v.	:	Record No. 931104
	:	
CALVIN W. PHILLIPS, et al.	:	
	:	
Defendants/Appellees	:	

PLAINTIFF/APPELLANT'S NOTICE OF APPEAL

COMES NOW the Plaintiff/Appellant, Kendall H. Breedlove, *pro se*, and states as follows for his *Notice of Appeal:*

1. Plaintiff/Appellant declares his intention, in compliance with Rule 5:41 of the *Rules of the Supreme Court of Virginia*, to file an appeal with the Supreme Court of the United States, or to seek a writ of certiorari from that court, from the final determination by this Court:

a. In denying Plaintiff/Appellant's *Preliminary Petition for Rehearing*, in action dated February 25, 1994; and

b. In denying Plaintiff/Appellant's *Petition to Rehear Motion for Extension of Time to File Complete Petition for Rehearing Brief*, in action dated March 8, 1994.

2. Plaintiff states that his Constitutional rights to due process and to equal protection under law have been denied to him.

Respectfully submitted,
Kendall H. Breedlove, *pro se*

/s/ Kendall H. Breedlove

2831 Gallows Road, Suite 145
Falls Church, VA 22042

Exhibit 10, continued
CERTIFICATE

Pursuant to Rule 5:17 of the *Rules of the Supreme Court of Virginia*, Plaintiff/Appellant, *pro se*, certifies as follows:

(a) The appellant is Kendall H. Breedlove, representing himself *pro se*, 2831 Gallows Road, Suite 145, Falls Church, Virginia 22042, no available telephone number presently. The appellees are: Calvin W. Phillips, who apparently is now *pro se*, 310 Maple Avenue West, Suite 198, Vienna, Virginia 22180, no available telephone number presently; Joyce E. Horton and James H. Horton, husband and wife, who are represented by J. Charles Curran, Kidwell, Kent & Sullivan, 9695-C Main Street, Fairfax, Virginia 22031, telephone number (703) 764-0600.

(b) The undersigned hereby certifies that he caused one copy of the foregoing **Plaintiff/Appellant's Notice of Appeal** to be served by first-class mail, postage prepaid, upon Calvin W. Phillips, *pro se*, at 310 Maple Avenue West, Suite 198, Vienna, VA 22180; and one copy to be served by first-class mail, postage prepaid, upon Mr. J. Charles Curran, Kidwell, Kent & Sullivan, 9695-C Main Street, Fairfax, VA 22031, counsel for Defendants/Appellees Joyce E. Horton and James H. Horton, on this **11th** of March, 1994.

/s/ Kendall H. Breedlove
Kendall H. Breedlove, *pro se*

2831 Gallows Road, Suite 145
Falls Church, VA 22042

Exhibit 11 (Excerpts from *Motion for Judgment, Breedlove v. Phillips, et al.*, Fairfax at law #117967, filed August 27, 1992)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

KENDALL H. BREEDLOVE,
8149 Larkin Lane
Vienna, VA 22182
Plaintiff

v. : At Law No. 117967

CALVIN W. PHILLIPS, aka
D. ANDERSON, aka DENNIS ANDERSON,
aka LESTER C. McCALL, aka
INMATE #89575

Serve: Calvin W. Phillips
PRISON INMATE #89575
c/o Warden, Brushy Mountain
State Penetentiary
Highway 116 (P.O. Box 1000)
Petros, Tennessee 37845
Telephone 615-324-4011

and

JOYCE E. HORTON, Authorized Agent
for Calvin Phillips

Serve: 841 Cumberland Drive
Warrenton, Virginia 22186

and

JOYCE E. HORTON and JAMES H. HORTON,
husband and wife, in their
individual capacities, jointly
and severally

Serve: 841 Cumberland Drive
Warrenton, Virginia 22186

Defendants

MOTION FOR JUDGMENT

SUMMARY

1. This is an action in 12 counts for: (a) common law defamation of title, (b) common law defamation of name, (c) statutory defamation as set forth in §8.01-45, *Action for insulting words*, of the Code of Virginia, 1950, as amended, (d) conspiracy for common law defamation of title, and (e) conspiracy to injure Plaintiff in his trade, business and profession as set forth in §18.2-499, *Combinations to injure others in their reputation, trade, business or profession; rights of employees*, and §18.2-500, *Same; civil relief; damages and counsel fees; injunctions*, of the Code of Virginia, 1950, as amended.

2. The complaint is more specifically set forth in 12 counts, as follows:

COUNT I: Common Law Defamation of Title (January 14, 1992, Mechanics' Lien) p. 4

COUNT II: Common Law Defamation of Title (November 27, 1991, Mechanics' Lien) p. 21

COUNT III: Common Law Defamation of Title (May 22, 1992, Alleged Partial Release) p. 37

COUNT IV: Common Law Defamation of Name (January 14, 1992, Mechanics' Lien) p. 44

COUNT V: Common Law Defamation of Name (November 27, 1991, Mechanics' Lien) p. 49

COUNT VI: Common Law Defamation of Name (May 22, 1992, Alleged Partial Release) p. 53

COUNT VII: Common Law Defamation of Name (May 22, 1992, Alleged Partial Release) p. 57

COUNT VIII: Statutory Defamation (November 27, 1991, Mechanics' Lien) p. 61

COUNT IX: Statutory Defamation (January 14, 1992, Mechanics' Lien) p. 65

COUNT X: Statutory Defamation (May 22, 1992, Alleged Partial Release) p. 70

COUNT XI: Conspiracy for Common Law Defamation of Title (May 22, 1992, Alleged Partial Release) p. 74

COUNT XII: Conspiracy To Injure Plaintiff in his Trade, Business and Profession p. 83

Exhibit 12 (Excerpt from October 23, 1992 memo)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

KENDALL H. BREEDLOVE, Plaintiff :
:
v. : At Law No. 117967
:
CALVIN W. PHILLIPS, *et al.*, Defendants :

MEMORANDUM IN OPPOSITION TO DEFENDENTS' MOTION FOR DEMURRER

* * * * *

II. QUESTION PRESENTED—Does a writing, entitled mechanics' lien: (1) not in substantial compliance with the requirements of VA Code §43-4 and 43-5; (2) prepared with fraudulent intent; (3) containing falsities, including a perjured and forged affidavit created fraudulently (admitted by Defendant Phillips in written answers to interrogatories, under oath); and (4) incapable of forming the basis for sustaining a subsequent suit to enforce the lien, take on the character of a mechanics' lien and, thereby, gain access to the protection of absolute privilege against defamation or is the writing a nullity or sham exception outside the protection of absolute privilege against defamation?

III. ARGUMENTS AND AUTHORITIES

A. **Summary of Argument**—This case entails the coming together of a number of unlawful actions by Defendants, acting in concert, and upon multiple instances, to use the mechanics' lien statutes for unlawful purposes, to commit perjury and forgery, to engage in mail fraud and wire fraud, and then to claim absolution for their actions based upon absolute privilege accorded to mechanics' liens. Substantial questions of fact permeate the case, which should not be determined by Demurrer.

* * * * *

C. **Response to Defendants'** [*Respondents'*] **allegation:** "Virginia Does Not Recognize A Claim For 'Defamation'

Arising From A Mechanics' Lien or Release of Mechanics' Lien," citing *Donohoe Constr. Co. v. Mount Vernon Assoc., 235 Va. 531*—

* * * * *

The situation in Breedlove is analogous to the recognized sham litigation exception for absolute privilege recognized in 53 C.J.S. Libel and Slander §71. Plaintiff makes an exceedingly strong factual showing in the Motion for Judgment of the sham nature of the alleged "mechanics' liens." A Defendant's demurrer to plaintiff's pleading in an action for defamation admits the truth of all material and relevant facts which are well pleaded, and all inferences which are reasonable deductible therefrom. (58 C.J.S. §156). Using the pleaded facts in *Breedlove* as truthful, the actions of Defendants amount to the filing of sham mechanics' liens which should provide a basis for an exception to the absolute privilege protection of *Donohoe*.

A decision to permit the application of *Donohue's* absolute privilege to Breedlove would be abusive of public policy and incongruous with the tendency and policy of the courts not to extend the absolute privilege unless the public policy upon which privilege is based is found to exist in new situations. (50 Am Jur 2d Libel and Slander §194).

* * * * *

F. **Defendant's** [*Respondents'*] **use of demurrer in Breedlove is defective.**—

* * * * *

(3) Plaintiff Breedlove pleads malicious actions by the defendants. The matters pertaining to malice were not objected to by the defendants as not being properly alleged. Consequently, malice, when property alleged, becomes a question of fact which cannot be determined on general demurrer. (53 C.J.S. Libel and Slander §154, *Moore v. Leverett*, Com. Appl, 52, S.W.2d 252).

Exhibit 13 (Excerpt from June 2, 1993 Petition to Rehear)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

KENDALL H. BREEDLOVE, Plaintiff	:	
	:	
v.	:	At Law No.
	:	117967
	:	
CALVIN W. PHILLIPS, *et al.*	:	
	:	
Defendants	:	

PLAINTIFF'S PETITION TO REHEAR

* * * * *

6. As a result of the summary judgments favoring the Plaintiff rendered in chancery #92-609 and chancery #92-701, certain judicial questions need to be resolved in this cause (At Law #117967). The following questions, supported by *Plaintiff's Memorandum in Support of Plaintiff's Petition To Rehear*, filed concurrently with this petition, are the questions which Plaintiff petitions to be reheard:

A. Are the contextual words of a document entitled a "mechanics' lien," even though formatted in compliance with Virginia Code §43-5, when filed and recorded in a false, unregistered fictitious name, (with a false address, claiming a false amount, containing a perjured oath for its acknowledgment, and a forged signature, and which is wilfully false) "**relevant and pertinent**" to a suit to enforce the "mechanics' lien" when such suit to enforce would have to be conducted in the name of a false, fictitious litigant—such suit being inseparable from the perfected "mechanics' lien," as recognized in *Donohoe Constr. Co. v. Mount Vernon Assoc., 369 S.E.2d 857, 235 Va. 531 (1988)*?

B. Does an action for defamation lie from the filing of a mechanics' lien, where the filing is clearly an abuse of the

mechanics'-lien/suit-to-enforce judicial process and its associated privilege, as recognized in *Alexandria Gazette Corp. v. West, 93 S.E.2d 274, 198 Va. 154 (1956)*?

C. Does Virginia recognize a sham-litigation exemption from the holding set forth in *Donohoe Constr. Co. v. Mount Vernon Assoc., 369 S.E.2d 857, 235 Va. 531 (1988)*, which exemption would deny granting absolute privilege against defamation to the contractor filing a mechanics' lien, when the subject mechanics' lien filed is clearly defective in that it is created in false claimant name, false claimant address, false amount claimed (including amounts for labor and materials outside the 150-day-prior statutory window), with perjured oath, and forged signature, as distinguished from the mechanics' lien adjudged invalid in *Donohoe* because it was filed prematurely, although filed in valid name, valid address, valid oath, and valid signature?

D. Is Defendant Phillips entitled to claim a potential right to assert absolute privilege as a defense in a suit for defamation, in accordance with *Donohoe Constr. Co. v. Mount Vernon Assoc., 369 S.E.2d 857, 235 Va. 531 (1988)*, when such right exists in a false, unregistered fictitious name—*Dennis Anderson* or *D. Anderson*—which is not Phillips' name?

E. Can other co-conspirators be sheltered behind the defense of absolute privilege in a defamation suit, which one conspirator (Defendant Phillips) may be entitled to assert?

F. Does the filing of a sham "Certificate of Partial Release of Mechanics' Lien," not a *Certificate of Partial Satisfaction*, and not in compliance with Virginia Code §43-67, and its referenced §55-66.3 and §55-66.4, for the release of mechanics' liens, containing multiple, fatal defects and based upon an invalid mechanics' lien (filed in a false, unregistered fictitious name), rise to become an occasion entitled to absolute privilege against defamation or does either a sham-litigation exemption from the absolute privilege against defamation exist or an abuse of absolute privilege exist in such instance?

Exhibit 14 (Excerpt from June 2. 1993, memo in support of Petition to Rehear)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

KENDALL H. BREEDLOVE, Plaintiff :
:
v. : At Law No. 117967
:
CALVIN W. PHILLIPS, *et al.*, Defendants :

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S PETITION TO REHEAR

* * * * *

II. QUESTIONS PRESENTED FOR REHEARING—Plaintiff is petitioning to have reheard certain questions pertaining to the October 30, 1992, hearing on Defendants' Demurrer, based upon new evidence and *res judicata* arising from the adjudication in Arlington County Circuit Court of related causes: Plaintiff Breedlove's chancery #92-609, chancery #92-701, and non-suit of Defendant Phillips' chancery #92-532. The questions to be reheard are:

* * * * *

III. ARGUMENTS AND AUTHORITIES

A. **Summary of Argument—**

Plaintiff asserts that absolute privilege does not apply in this case, in that: (1) the words of these liens are not relevant and pertinent to a suit to enforce, when such suit would be in the name of a false, fictitious litigant; or (2) the three liens are each a nullity; and as nullities, these writings cannot form the basis for a subsequent suit to enforce, from which absolute privilege could arise; or (3) these liens abuse the mechanics'-lien/suit-to-enforce judicial process and abuse its privilege; or (4) the invalid mechanics' liens are a sham and accordingly are entitled to an exemption from absolute privilege; or (5) one mechanics' lien and the lien contained within the May 22, 1992, "Certificate of Partial Release of

Mechanics' Lien," were *void ab initio*, and as such, are not mechanics' liens within the scope of *Donohoe*.

B. ***Argument supporting resolution of Question A in favor of Plaintiff:*** **The contextual words of a document, entitled a "mechanics' lien," even though formatted in compliance with Virginia Code §43-5, when filed and recorded in a false, unregistered fictitious name, (with a false address, claiming a false amount, containing a perjured oath for its acknowledgment, and a forged signature, and which is wilfully false) are *not "relevant and pertinent"* to a suit to enforce the "mechanics' lien" when such suit to enforce would have to be conducted in the name of a false, fictitious litigant——such suit being inseparable from the perfected "mechanics' lien," as recognized in *Donohoe*.**

* * * * *

8. a. The November 27, 1991, and January 14, 1992, mechanics' liens do not conform substantially to the requirements of Virginia Code §43-5, in that the contextual information provided in the mechanics' lien format is false, and wilfully so, and makes a mockery of the intent of the statute, to the end of extorting money. It is a key distinction that the format of these mechanics' liens complies with the format requirements of Virginia Code §43-5—they appear initially to be regular on their faces—but their *content* is false and mocks the statute, abusing the mechanics' lien process to the end of extortion.

b. Specific *res judicata* of the invalid November 27, 1991 mechanics' lien are delineated in a list of defects set forth in Arlington County Circuit Court records, as a [*3-page*] table (TAB B) labeled "Exhibit A, Analysis of Failures of November 27, 1991, Mechanics' Lien, To Comply With Statutory Requirements of §43-4, §43-5, and §43-15 for Mechanics' Liens," to *Plaintiff's Memorandum in Opposition to Defendant Phillips' Motion For Demurrer*, filed November 17, 1992, in chancery #92-609, in Arlington County Circuit Court, presented at Attachment 3 to *Plaintiff's Petition To Rehear*.

* * * * *

12. Plaintiff Breedlove had denied the claim represented in the November 27, 1991 mechanics' lien on two separate occasions, verbally, to Defendant Joyce Horton and had sent a letter, dated May 13, 1992, to Defendants' counsel, James R. Hart, prior to the filing of chancery #92-532 on May 26, 1992, denying the claim and drawing attention to the basic fatal flaws of the liens: false name, perjured oath, and forged signature.

13. The substance of Plaintiff Breedlove's May 13, 1992, letter to Attorney Hart (see Exhibit B to the *Amended Motion for Judgment* {At Law #117967} for the entire letter) was: (a) the written confirmation of Plaintiff's two verbal denials; (b) the discussion of two spurious mechanics' liens, in the name *D. Anderson*, filed on Plaintiff's properties; (c) the fact that there was no official registration of any such *D. Anderson* in government records of Arlington, Fairfax, or Prince William Counties; (d) that both liens had the appearance of being sworn to in front of a Notary to whom the claimant would have to identify himself and the question as to how Hart's client Phillips could so identify himself as *D. Anderson*; and (e) an invitation of Attorney Hart's attention to the Virginia Code sections: §18.2-22, *Conspiracy to commit felony*; §18-2-172, *Forging, uttering, etc. other writings*; §18.2-434, *What deemed perjury; punishment and penalty*; §18.2-499, *Combinations to injure others in their reputation, trade, business or profession*; and §18.2-500, *Same; civil relief; damages and counsel fees; injunctions*; and to the United States Code sections: 18 USCA §1341, *Mail fraud: frauds and swindles*; 18 USCA §1342, *Mail fraud: fictitious name or address*; 18 USCA §1343, *Mail fraud: fraud by wire, radio, or television*, and 18 USCA §1961 *et seq.*, *Racketeer Influenced and Corrupt Organizations: definitions*. It would seem that **such letter would put a reasonable man on notice** that there was something about these mechanics' liens that was palpably wanting in relevancy and propriety in relation to any valid cause of action.

* * * * *

16. a. The May 22, 1992, "Certificate of Partial Release of Mechanics' Lien," does not conform substantially to the

requirements of Virginia Code §43-67, and its referenced §55-66.3 and §55-66.4, for the release of mechanics' liens, in that: (1) it is based on the wilfully false, invalid November 27, 1991 mechanics' lien; (2) it contains an improper, invalid lien and the multiple defects enumerated in section III (G) (2), below; and (3) it was not filed in good faith, as is argued in section III (D) (3), below. In particular, given the name change of the lien claimant which this document attempted to make, it is important to recognize that the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien" did not contain or attach the required sworn statement of legal holder status mandated by Virginia Code §55-66.3 and §55-66.4.

b. Specific *res judicata* of the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien" and the invalid lien contained within it, are delineated in list of defects set forth in Arlington County Circuit Court records as a [*3-page*] table (TAB C) labeled "Exhibit 1, Analysis of Failures of Lien Within May 22, 1992, Alleged Partial Release To Comply With Statutory Requirements of §43-4, §43-67, §55-66.3 and §55-66.4 for a Lien or a Partial Release," to Plaintiff's *Memorandum in Opposition to Defendant Horton's Motion For Demurrer*, filed March 5, 1993, in combined chancery #92-532 and #92-701, in Arlington County Circuit Court, presented at Attachment 4 to *Plaintiff's Petition To Rehear* (At Law #117967).

17. In contrast to *Donohoe*, no reasonable man could doubt the palpable irrelevancy and impropriety of such document in *Breedlove v. Phillips, et al.*, as the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien." No such document is mandated by statute and the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien," document does not comply with the statutory requirements of Virginia Code §43-67, and its referenced §55-66.3 and §55-66.4, for the release of mechanics' liens. No reasonable man could contend in good faith that such sham release and the invalid lien it contains could ever constitute probable cause for an action or give rise to an action, to be brought and maintained in court, especially in view of its problems in surmounting the requirements of Virginia Code §11-2, the Statute of Frauds, and in view of Plaintiff's May 13, 1992, letter to Defendants' counsel,

pointing out the basic, fatal flaws of the liens: false name, perjured oath, and forged signature.

18. "Whether action is for slander or for libel, test to be applied upon plea of privilege in judicial proceedings is the relevancy of alleged offending language to matter in inquiry." [*Massey v. Jones, 28 S.E.2d 623, 182 Va. 200*]

19. In contrast to *Donohoe*, no reasonable man could doubt that the language in the content of such documents in *Breedlove v. Phillips, et al.*, as the false, invalid November 27, 1991, and January 14, 1992, mechanics' liens is irrelevant to an inseparable suit to enforce, to gain a remedy for a false, fictitious claimant, and which language and content is contrary to the mandates of Virginia Code §43-4 and §43-5, is abhorrent to their intent, and is violative of public policy.

C. ***Argument supporting resolution of Question B in favor of Plaintiff:*** **An action for defamation *does* lie from the filing of a mechanics' lien, where the filing is clearly an abuse of the mechanics'-lien/suit-to-enforce judicial process and its associated privilege.**

1. "An absolutely 'privileged publication' is one for which action for libel or slander will not lie, **unless such privilege has been abused.**" [*bold emphasis added by Plaintiff to Alexandria Gazette Corp. v. West, 93 S.E.2d 274, 198 Va. 154 (1956)*]

2. The November 27, 1991, and January 14, 1992, mechanics' liens and the May 22, 1992, "Certificate of Partial Release of Mechanics' Lien," abuse the mechanics' lien process and its attendant judicial proceedings, making a mockery of them, and in so doing forfeit any right to be protected by privilege under a judicial system for which they demonstrate contempt and which they seek to exploit for extortion.

* * * * *

Exhibit 15 (Excerpts from *Petition for Appeal*, dated August 6, 1993)

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 931104

KENDALL H. BREEDLOVE

v.

CALVIN W. PHILLIPS, aka
D. ANDERSON, aka DENNIS ANDERSON,
aka LESTER C. McCALL, aka
INMATE #89575

and

JOYCE E. HORTON, Authorized Agent for Calvin Phillips

and

JOYCE E. HORTON and JAMES H. HORTON,
husband and wife, in their individual capacities,
jointly and severally

PETITION FOR APPEAL

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* * * * *

ARGUMENT

A. The contextual words of a document, entitled "mechanics' lien," even though formatted in compliance with *Virginia Code §43-5*, when filed and recorded in a false, unregistered fictitious name, with a false address, claiming a false

amount, containing a perjured oath for its acknowledgment, and a forged signature, and which is wilfully false are *not "relevant and pertinent"* to a suit to enforce that "mechanics' lien" when such suit to enforce would have to be conducted in the name of a false, fictitious litigant—such suit being inseparable from the perfected "mechanics' lien," as recognized in *Donohoe*.

B. An action for defamation from the filing of a mechanics' lien, *does* lie where the filing is clearly an abuse of the mechanics'-lien/suit-to-enforce judicial process and its associated absolute privilege.

C. Virginia should recognize a sham-litigation exemption from the absolute privilege holding set forth in *Donohoe*, which exemption would deny the right to assert a defense of absolute privilege to defamation arising from the filing of a mechanics' lien which is sham.

D. Defendant Phillips is not entitled to claim a potential right to assert absolute privilege as a defense in a suit for defamation, in accordance with the *Donohoe* rule, when such right exists in a false, unregistered fictitious name—*Dennis Anderson* or *D. Anderson*—which is not Phillips' name.

E. Other co-conspirators cannot be sheltered behind the defense of absolute privilege in a defamation suit, which one conspirator (Defendant Phillips) may be entitled to assert.

F. The filing of a sham "Certificate of Partial Release of Mechanics' Lien," not a *Certificate of Partial Satisfaction*, and not in compliance with the statutory requirements of *Virginia Code §43-67*, and its referenced *§55-66.3* and *§55-66.4*, for the release of mechanics' liens, containing multiple fatal defects and based upon an invalid mechanics' lien (signed, sworn to, and filed in a false, unregistered fictitious name), *does not rise* to become an occasion entitled to absolute privilege against defamation, being either an instance of a sham-litigation exemption from the absolute privilege against defamation, or being an instance of an abuse of privilege.

Exhibit 16 (Excerpts from *Preliminary Petition for Rehearing*, dated February 8, 1994; of which, motion was denied February 10, 1994, and petition was denied February 25, 1994)

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

KENDALL H. BREEDLOVE,	:	
	:	
Plaintiff/Appellant	:	
v.	:	Record No. 931104
	:	
CALVIN W. PHILLIPS, et al.	:	
	:	
Defendants/Appellees	:	

PLAINTIFF/APPELLANT'S
PRELIMINARY PETITION FOR REHEARING
AND MOTION FOR EXTENSION OF TIME TO FILE
COMPLETE *PETITION FOR REHEARING* BRIEF

* * * * *

2. Plaintiff/Appellant is filing this instant *Preliminary Petition for Rehearing* timely, in accordance with Rule 5:20, "Denial of Appeal; Petition for Rehearing," of the *Rules of the Supreme Court of Virginia*.

B. The Supreme Court of Virginia's Decision Denying the Instant Petition for Appeal Places This Court in Opposition to the Supreme Court of Missouri on the Same Principle of Law—

* * * * *

4. By this January 13, 1994, decision, this Supreme Court of Virginia has rendered a decision in the instant *Petition for Appeal* which places this Supreme Court of Virginia in exact opposition to a decision in 1942 by the Supreme Court of Missouri on the same basic principle of law, held in *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065 (1942), as follows:

* * * * *

5. The factual circumstances of the instant *Petition for Appeal* are virtually identical with the circumstances of *Laun v. Union Electric*, stated in paragraph B 4 b , above, that is, the Defendants/Appellees did not point out or even say that there were any cogent reasons of public policy compelling the application or extension of absolute privilege to them. The Defendants/Appellees simply stood on the proposition that the publication complained of was the filing of two mechanics' liens and a partial release in the public records of the Circuit Courts of Arlington and PrinceWilliam Counties, Virginia—those were the three occasions—and being so were privileged occasions—according to *Donohoe, supra*—affording a complete defense to all and sundry who might be charged (whether parties to the mechanics' liens and partial release or not) with defamation, conspiring to defame, and with procuring another to publish defamatory matter on a privileged occasion or in such a manner that the actual publisher is immune from liability.

* * * * *

7. Thus, by its decision in the instant action, the Supreme Court of Virginia has ruled, particularly as regards sources of error numbered 4 and 5, in paragraph B 2, above, that persons—the Defendants/Appellees—who stood in character neither as parties nor as pleaders to the privileged occasion or instance of each mechanics' lien, and the dubious occasion of a partial release, were entitled to assert the claim of absolute privilege associated therewith. This decision is a direct contravention of the holding of *Laun V. Union Electric Co. of Missouri, supra.*

* * * * *

C. The Supreme Court of Virginia's Decision Denying the Instant Petition for Appeal Denies the Plaintiff/Appellant His Constitutional Rights of Due Process and Equal Access to the Courts Under Law—

* * * * *

D. Motion for Extension of Time to File Complete Petition for Rehearing Brief—

* * * * *

4. As a non-attorney and being only one person, Plaintiff/Appellant can only accomplish so much legal work in a particular period of time circumscribed by court deadlines.

5. Plaintiff/Appellant does take pride in his work and has, throughout this action and associated actions, endeavored to produce the highest quality work product of which he is capable. Plaintiff/Appellant askes this Court's indulgence for a reasonable, but short, period of time in which to transform this *Preliminary Petition for Rehearing* into a properly finished work product, more along the lines of Plaintiff/Appellant's *Petition for Appeal*, which this Court already has on file.

WHEREFORE, Plaintiff/Appellant prays that as a consequence of this new matter—not considered previously by this Court—the Plaintiff/Appellant prays to have rehearing of his *Petition for Appeal*; that his *Motion for Extension of Time to File Complete Petition for Rehearing Brief* be granted and that he have a reasonable, but short, extension of time in which to file a more complete brief, in proper form, supporting his *Petition for Rehearing*, not to exceed 15 pages in length; together with such other and further relief as the Court deems appropriate and the nature of the case may require.

Exhibit 17 (Excerpts from *Supplement to Petition for Rehearing*, dated February 8, 1994, which was denied finally March 8, 1994)

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 931104

KENDALL H. BREEDLOVE

v.

CALVIN W. PHILLIPS, *et al.*

SUPPLEMENT TO PETITION FOR REHEARING

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* * * * *

STATEMENT OF THE CASE

* * * * *

5. By this January 13, 1994, refusal, this Court has created the effect in the instant *Petition for Appeal* which places this Court in opposition to the supreme law of the land, as propounded by the United States' Supreme Court, in 1845, in *White v. Nicholls, supra*, and in exact opposition to a decision by the Supreme Court of Missouri on a same basic principle of law, held in *Laun v. Union Electric Co. of Missouri, supra.*

6. Thus, by its decision in the instant *Petition for Appeal*, this Court has created the effect, particularly as regards sources of error numbered 4 and 5 in paragraph 3, in "Statement of the Case," above, that persons—the Defendants/Appellees—who stood in character neither as parties nor as pleaders to the privileged occasion or instance of each mechanics' lien, were entitled to assert the claim of absolute privilege associated therewith. This decision is a direct

contravention of the holding of *Laun V. Union Electric Co. of Missouri, supra.*

7. Further, by its decision in the instant *Petition for Appeal*, this Court has created the effect that: (a) allegation and proof of express malice does not defeat privilege; (b) privilege may flow from one occasion to another without regard to relevancy, in contravention of the holding of *Higgins v. Coal Co.*, 103 W.Va 504, 138 S.E. 112 (1927) by the Supreme Court of West Virginia (which had been cited by this Court with approval in *Penick v. Ratcliff*, 149 Va. 618, at 636, 140 S.E. 664 (1927)); and (c) that joint tortfeasors may partake equally of any privilege available to one, in contravention of the holding of *Rice v. Coolidge*, 121 Mass. 393, 23 Am Rep 279 (1876) by the Supreme Court of Massachusetts (which had been cited with approval by the Supreme Court of Missouri in *Laun v. Union Electric Co. of Missouri, supra.*

8. Such decision by this Court on basic principles of law—principles of law not arising from statutory law of Virginia and, therefore, peculiar to Virginia as a sovereign state—in direct opposition to previous, long-established decisions on the same principles of law by the Supreme Court of the United States and by other states' supreme courts, creates a circumstance where decided principles of law are made uncertain and the supreme law of the land is opposed by a state supreme court.

9. Furthermore, for this Court to create such effect (a) contrary to established holdings by the Missouri Court, and the Supreme Courts of other states, and (b) at variance with the supreme law of the land, as propounded in *White v. Nicholls, supra*, and (c) at variance with its own previously stated decisions [*e.g.*, *Alexandria Gazette Corp. v. West, supra*, and *Penick v. Ratcliff*, 149 Va. 618, 140 S.E. 664 (1927)]—without even hearing the Plaintiff/-Appellant's appeal fully—**denies the Plaintiff/Appellant his Constitutional rights to due process and to equal protection under the law, including equal access to the courts and to his right to have his appeal heard and to have the case submitted to a jury.**

10. In this manner, **this Court has abridged the Constitutional rights of Plaintiff/Appellant.**

11. The occasion of this instant *Petition for Rehearing* is that the Plaintiff/Appellant did further substantial legal research over the Christmas holidays, following his oral argument to this Court on December 17, 1993, and located the decision of *Laun v. Union Electric Co. of Missouri*, and related decisions, including *White v. Nicholls, supra*, which Plaintiff/Appellant had not included in his original *Petition for Appeal* or in his oral argument and, accordingly, had not called to the attention of this Court.

* * * * *

ARGUMENT

A. *Summary of Argument*

1. The Plaintiff/Appellant had a right to require that the case be submitted to a jury for the jury to make determinations concerning the publications, as follows:

a. The jury, properly instructed, must determine—from among the disputed facts—those facts which constitute the documents as being an occasion belonging to one of the four subclasses of privileged communications (upon which facts the court would then rule in law as to the nature of the occasion and the privilege to be accorded to the parties thereto).

b. Depending on the subclass to which the documents are found to belong, the jury must determine (1) whether there was an abuse of privilege associated with an occasion of absolute privilege sufficient to render the publications actionable, (2) whether words were used *bona fide*, and (3) whether malice did or did not mark these publications, in accordance with the supreme law of the land propounded in *White v. Nicholls, supra*.

2. Upon *demurrer*, such absolute privilege as found by the trial court in the occasions complained of, creating an exception to the rules of libel, imposes a burden on the Plaintiff/Appellant to

remove presumptions flowing from the occasions, and requires the Plaintiff/Appellant to bring home to the Defendants/Appellees the existence of malice as the true motive of their conduct. "Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms." [*White v. Nicholls, ibid., at 291; ibid., at 603.*]

3. It would appear that, upon *demurrer*, express allegations of falsehood and the absence of probable cause will amount to the allegation of actual malice. Regardless of whether this be the result, Plaintiff/Appellant did expressly allege actual malice in the Defendants/Appellees.

4. Plaintiff/Appellant did expressly allege facts controverting whether these documents were mechanics' liens, and argued therefrom that they were not such, and did expressly allege facts—false, feigned name—constituting these documents an abuse of the process of the courts.

5. Given the allegations in the *Motion for Judgment*: (1) of controversy of facts whether the documents constitute such a proceeding as they purport to be—mechanics' liens—and, therefore, whether they constitute an occasion of publication within one of the four subclasses of the class of privileged communications; (2) of facts constituting abuse of process; (3) of falsehood; (4) of absence of probable cause, and (5) of express malice in the Defendants/Appellees—the trial court had an obligation to submit the case and the circumstances surrounding it to the jury for determination, and not to dismiss the 10 counts of defamation, based upon the trial court's ruling alone.

6. The holding of the Missouri Court in *Laun v. Union Electric Co., supra*, is that *original* publishers of defamatory matter, published in judicial documents on a judicial occasion, who are in character as parties or pleaders to the judicial action, may assert the immunity of *absolute* privilege of such occasion against suit for libel or slander.

* * * * *

7. Applying *Laun v. Union Electric Co., supra,* to the instant *Petition for Appeal,* allows differentiating the character of office of the various Defendants/Appellees as regards the 10 counts of defamation and slander of title. Applying *Higgins v. Coal Co.,* 103 W.Va. 504, 138 S.E. 112 (1927), allows distinguishing whether privilege from one occasion may flow to publication on another occasion, based upon relevancy. Applying *Rice v. Coolidge,* 121 Mass. 393, 23 Am Rep 279 (1876), makes clear that joint tortfeasors do not partake equally of any privilege. Again applying *Laun v. Union Electric Co., supra,* makes clear that "the actual publisher is not alone legally responsible for the defamatory publication" but all and each "who in any wise are concerned in the production of the writing are liable as publishers" and each must justify the publication or bring himself within a privilege to be exonerated.

8. Combining the application of these cases in an analysis of the circumstances in the instant *Petition for Appeal,* yields the results shown in *Exhibit 1, Table of Privilege as to Parties and Named Defendants, Malice Pleaded, and Resultant Trial Court Errors,* on the following page.

[*Petitioner's Note: The table referred to, in the preceding paragraph 8 and appearing on page 8 of the brief, is a dense, small-type matrix of facts and paragraph references to the Motion for Judgment, at law #117967, comprised of about 150 cells, already reduced onto an 8 1/2 x 11 page, which does not bear further reduction to this page size. The table documents the class of privilege, as set forth in* White v. Nicholls, supra, *which is potentially applicable to each Defendant and the specific allegations, by paragraph number and page, which defeat the privilege, either by abuse of privilege and/or malice in the Defendant, as pleaded by Plaintiff; together with paragraph and page references to factual allegations pleaded in the Petitioner's original Motion for Judgment as to whether documents constitute mechanics' liens entitled to privilege, which facts were disputed by Defendants.*]

Exhibit 18 (*Connecticut v. Doehr* quotes)

The judicial test for constitutionality of *Connecticut v. Doehr*, *supra*, is summarized in the reporter of decision's summary of the 115 Lawyers Edition, 2d, at page 2, as follows:

"In that portion of the opinion by WHITE, J., expressing the unanimous view of the court, it was held that the Connecticut statute violated the due process clause as applied to the case at hand by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstances, where:

"(1) the property interests that attachment affected were significant, and a state's procedures for creating and enforcing attachments were subject to the strictures of due process;

"(2) the risk of erroneous deprivation that the statute permitted was substantial;

"(3) the postdeprivation safeguards afforded by Connecticut did not adequately reduce the risk of such error;

"(4) the interests in favor of an ex parte attachment were too minimal to diminish the need for a predeprivational hearing;

"(5) Connecticut's substantive interest in protecting any rights of the plaintiff could not be any more weighty than the plaintiff's interest;

"(6) unlike the Connecticut statute, the remedy of attachment historically required (a) a threat to the satisfaction of the plaintiff's potential award, (b) a dispute between debtors and creditors, and (c) the posting of a bond; and

"(7) only Connecticut allowed prejudgment attachment of real estate with respect to a nonequitable claim absent exigent circumstances and without either a hearing or the posting of bond.

"Also, White, J., joined by MARSHALL, STEVENS, and O'CONNOR, JJ., expressed the view that (1) it was appropriate to

consider in the case at hand whether the due process clause additionally required that a plaintiff seeking ex parte prejudgment attachment post a bond or other security; and (2) due process generally required both a bond and either a preattachment hearing or a showing of exigency." [*Id.*, at 2.]

Exhibit 19 (*White v. Nicholls* quotes)

Of the particular third subclass—judicial proceedings—of the class of privileged communications or publications applicable in the instant *Petition for Appeal*, the United States' Supreme Court stated in *White v. Nicholls, et al.*, 3 How. (44 U.S.) 266, 11 L. ed. 591 (1845):

1. "With respect to words used in the course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action of slander without proof of express malice; ... . * * * 'If, however, it be proved that they were not spoken bona fide, or express malice be shown, then they may be actionable.'" [*White v. Nicholls, id., at 288; id., at 601.*]

2. "We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding addressed to such tribunal, will render that publication, petition or proceeding libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice." [*White v. Nicholls, id., at 291; id., at 603.*]

3. "But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. **The jury, *and the jury alone*, were to determine whether this malice did or did not mark the publication.** It

would appear difficult *a priori* to imagine how it would be possible to appreciate a fact whilst that fact is kept entirely concealed and out of view. This question, however, need not be reasoned by the court; it has, by numerous adjudications, been placed beyond doubt or controversy. Indeed, in the very many cases applicable to this question, they almost without an exception concur in the rule, that **the question of malice is to be submitted to the jury upon the face of the libel or publication itself.**" [*bold emphasis added by Petitioner to White v. Nicholls, id.*, at page 292, *id.*, at page 603.]

Exhibit 20, (*Laun v. Union Electric Co.* quotes)

1. "Here the defendants are alleged to have caused defamatory matter to be published on a privileged occasion by one who was then a party to a judicial proceeding and, therefore, in a position to claim the privilege and the question is whether the present defendants may take advantage of that fact and claim that the privileged occasion [illegible] a defense as to them." [*Laun v. Union Electric Co. of Missouri, 350 Mo. 572, at 580, 166 S.W.2d 1065, at 1070 (1942).*]

2. "**The actual publisher** (meaning 'any act whereby the defamatory matter is intentionally or negligently communicated to a third person,' 3 Restatement, Torts, p. 192) **is not alone legally responsible for the defamatory publication but 'all who in any wise aid or are concerned in the production of the writing are liable as publishers;** the publication of the writing is the act of all concerned in the production of the writing. Thus, if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher.' (internal citations omitted.)" [*bold emphasis added by Petitioner to Laun v. Union Electric Co., id., at 580, id., at 1070.*]

3. "**Before the author or publisher may be exonerated he must be able to justify the publication or bring himself within an absolute or conditional privilege.** Clark v. McBaine, 299 Mo. 77, 252 S.W. 428." [*bold emphasis added by Petitioner to Laun v. Union Electric Co., id., at 581, id., at 1070.*]

4. "The defendants do not point out or even say there are any cogent reasons of public policy compelling the application or extension of absolute privilege to them. They simply stand on the proposition that the publication complained of is the filing of petitions in the District Court, that was the *occasion*, and being so was a privileged publication affording a complete defense to all and sundry who might be charged (whether parties to the pleadings and suits or not) with conspiring to defame and procuring another to publish defamatory matter on a privileged occasion or in such a manner that the actual publisher is immune from liability." [*Laun v. Union Electric Co., id., at 581, id., at 1070-71.*]

5. "We find no reason or principle of public policy demanding the extension of the doctrine [*of absolute privilege*] to those who are alleged to have procured the publication of the libelous matter by others who were privileged to do so because they were parties to litigation. **The present defendants may not take advantage of the privileged occasion because they are not in character as parties or pleaders to that privileged occasion or instance.**" [*bold emphasis added by Petitioner to Laun v. Union Electric Co., id., at 582, id., at 1071.*]

Exhibit 21 (*Higgins v. Coal Co.* quotes)

As to the matter of relevance, *Penick v. Ratcliff, supra*, cites with approval from *Higgins v. Coal Co.*, 103 W. Va. 504, 138 S.E. 112 (1927), where it is stated:

a. "The material allegations of the declaration are ... that in June, 1925, the defendants, contriving to injure the good name of the plaintiff, wrote a letter to the Commissioner, ..." [*Higgins v. Williams Pocahontas Coal Co. and H. E. Ewing, id., at 505-506.*]

b. "As its [*the defendant Coal Co.'s*] record was affected by the award to the plaintiff, it was interested therein. Because of such interest, the letter cannot be considered a voluntary communication. Even so, the law extends its aegis to a voluntary statement if it is 'pertinent to the issue being tried.' 36 C.J. p. 1259, Sec. 237. The inquiry before the Commissioner embraced the time and place of

the injury to plaintiff, as well as its severity. The statements in the letter were relevant to those subjects. It is not changed by falsity or maliciousness of its statements. **It is settled law that the test of a privileged statement is not its truth or good faith, but its relevancy.**" [*bold emphasis added by Petitioner to Higgins v. Coal Co., id., at 507.*]

c. "There is nothing in the declaration showing any connection between the company and Ewing [*the letter's author*] (except as conspirators), **or that he is entitled to claim the privilege extended to the company.**" [*bold emphasis added by Petitioner to Higgins v. Coal Co., id., at 508.*]

Exhibit 22 (*Rice v. Coolidge* quotes)

As cited with approval in *Laun v. Union Electric Co., supra, Rice v. Coolidge,* 121 Mass. 393, 23 Am Rep 279 (1876), states:

a. "The gist of the plaintiff's case is that the defendants have suborned witnesses to falsely swear to defamatory statements concerning her, and have done other connected acts in pursuance of a scheme or plan to defame her." [*Rice v. Coolidge, id., at 394.*]

b. "The reasons why the testimony of witnesses is privileged are that it is given upon compulsion and not voluntarily, and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by fear of being vexed by actions at the instance of those who are dissatisfied with their testimony. **But these reasons do not apply to a stranger to the suit, who procures and suborns false witnesses, and the rule should not be extended beyond those cases which are within its reasons.**" [*bold emphasis added by Petitioner to Rice v. Coolidge, id., at 395-396.*]

c. "The argument, that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal, is not satisfactory to our minds. The perjured

witness and the one who suborns him are joint tortfeasors, acting in conspiracy or combination to injure the party defamed. **The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tortfeasor from such suit.**" [*bold emphasis added by Petitioner to Rice v. Coolidge, id., at 396.*]

Exhibit 23 (*Shelley v. Kraemer* quotes)

1. "That the action of state courts and of judicial officers in their capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." [*Shelley v. Kraemer*, 334 U.S. 1, at 14, 92 L. Ed. 1161, at 1181, 68 S.Ct. 836 (Mo., 1948).]

2. "...[T]his Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings." [*Shelley v. Kraemer, id.*, at 14, *id.*, at 1181.]

3. "These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute." [*Shelley v. Kraemer, id.*, at 16, *id.*, at 1182.]

4. "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defen, has, of course, long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment." [*Shelley v. Kraemer, id.*, at 16, *id.*, at 1182.]

5. "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." [*Id.*, at 17, *id.*, at 1182-3.]

6. "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials." [*Id.*, at 18, *id.*, at 1183.]

7. "Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare." [*Id.*, at 23, *id.*, at 1186.]

Exhibit 24 (Seven Principles of Virginia Law Applied to the Petitioner by the Virginia Supreme Court in the Instant Case)

a. In contravention of *White v. Nicholls, supra*, a mechanics' lien is *always* entitled to *absolute* absolute privilege against defamation and slander of title—there is *no* set of factual circumstances which defeats that absolute privilege, including malicious abuse of the court's process, in bringing action in a *feigned* name and fraud on the court;

b. In contravention of *White v. Nicholls, supra*, any document bearing the name "mechanics' lien" is a mechanics' lien entitled to absolute privilege, even though filed sham in false, *feigned* claimant name, false claimant address, for false amount claimed, with perjured oath and forged signature, and adjudicated not to be in compliance with *Virginia Code §43-4* and *§43-5* for the creation of mechanics' liens;

c. In contravention of *Laun v. Union Electric Co. of Missouri, supra*, all and sundry may assert the defense of absolute privilege associated with that mechanics' lien, regardless of whether they are parties or pleaders to the action or not, and may thereby defeat any claims against them for defamation or slander of title;

d. In contravention of *Higgins v. Coal Co., supra*, and *Penick v. Ratcliff, supra, any* words published in a document entitled "mechanics' lien," regardless of whether those words are relevant or not and regardless of whether those words are malicious or not and regardless of whether those words are used *bona fide* or

not, are entitled to the protection of absolute privilege;

e. In contravention of *Rice v. Coolidge, supra*, as cited in *Laun v. Union Electric Co. of Missouri, supra*, absolute privilege existing in the *feigned* name of a not-in-life fictitious person may be claimed by anyone who is not that *feigned* person;

f. In contravention of *White v. Nicholls, supra*, a trial court judge, not a jury, is entitled to make the *sole* determination of question of fact among disputed, pleaded facts: (a) as to whether an occasion is privileged, (b) as to whether words are used *bona fide*, and (c) as to whether malice , as pleaded, marked the publication;

g. In contravention of *Rice v. Coolidge, supra*, as cited in *Laun v. Union Electric Co. of Missouri, supra*, all co-conspirators may assert as defense the privilege which (*arguendo*) one conspirator may be entitled to assert.

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Exhibit 25

Due Process Analysis of Mechanics' Lien Laws of the 50 States and the District of Columbia

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Alabama	*Code of Alabama* §35-11-210 et seq. (1991 Repl vol.)	No	No	No	No	No	No	No	No	No	No	NLT 6 mos 6 months
Alaska	*Alaska Statutes* §34.35.050 et seq. (Oct. 1990 vol.)	No	No	No	No	Yes	No	Yes 150%	No	Yes	No	NLT 90 days 6 months
Arizona	*Arizona Revised Statutes* §33-981 et seq. (1990 vol.) special protections for owner occupant	No	Yes, service after filing	No	No	No	No	Yes 150%	No	Yes	No	NLT 90 days 6 months
Arkansas	*Arkansas Code of 1987* §18-44-101 et seq. (1987 vol.)	Yes, 10 days + proof of service	No	No	No	No	No	Yes 200%	No	No	No	NLT 120 days 15 months
California	*California Codes, Annotated, Civil Code* §3004, 3097, 3109 et seq. (1993 vol.)	Yes, 20 days + proof of service	No	No	No	No	No	Yes 150%	No	No	No	NLT 90 days 90 days
Colorado	*Colorado Revised Statutes, Annotated* §38-22-101 et seq. (1990 vol.)	Yes, 10 days	No	No	No	No	No	Yes 150%	No	No	No	NLT 2 mos., extendable to 1 year; 6 months after completion
Connecticut	*Connecticut General Statutes of 1958, Annotated* §49-33 et seq. (1978 vol.; 1994 cum. supp.)	No	Yes, NLT 30 days after filing	No	Yes, owner may request with 4 days' notice	Yes	No	Yes, sufficient surety	No	No	No	NLT 90 days 1 year

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit required to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Delaware	*Delaware Code, Annotated* Title 25 §2701 et seq. (1989 Repl. vol.)	No	No	No	No	No	No	Yes 100%	No	Yes	No	NLT 90 days
District of Columbia	*District of Columbia Code Annotated* §38-101 et seq. (1981 Ed., 1990 Repl. vol.)	No	No	No	No	No	No	Yes 100%	No	No	No	NLT 90 days 1 year
Florida	*Florida Statutes, Annotated* §713.01 et seq. (1989 vol.)	No	No	No	No	No, owner can file contest to shorten time to enforce to 60 days	No	Yes 100%	No	Yes	No	NLT 3 months 1 year
Georgia	*Official Code of Georgia, Annotated* §44-14-360 et seq. (1982 vol, 1993 cum. supp.)	No, preliminary notice optional	Yes, at time of filing	No	No	No	No	Yes 200%	No	No, verification not required	No	NLT 3 months 12 months
Hawaii	*Hawaii Revised Statutes* Title 28 §507-41 et seq. (1985 Repl. vol, 1992 cum. supp.)	Yes, applic'n for lien and notice, return 3-10 days after service	No, principals at hearing	Yes, formal probable cause hearing	N/A	N/A	No	Yes 200%	Yes, with order directing lien to attach	Yes	Yes	NLT 45 days after completion 3 months
Idaho	*Idaho Code* §45-501 et seq. (1977 vol., 1993 cum. supp.)	No	Yes, NLT 24 hours of filing	No	No	No	No	Yes 150%	No	No	No	NLT 90 days 6 months

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Illinois	*Smith-Hurd Illinois Compiled Statutes, Annotated* 770 ILCS 60/1 et seq. (1993 vol.)	No	No	No	No	No	No	No	No	No	No	NLT 2 years re: owner; 4 months re: purchasers 2 years after completion
Indiana	*Indiana Statutes Annotated* §32-8-2-1 et seq. (1980 Repl. vol.; 1993 cum. supp.)	No	Yes, by recorder NLT 3 business days after filing	No	No	No, owner can require suit to foreclose be commenced within 30 days	No	Yes, pay any judgment, with surety	No	No	No	NLT 60 days
Iowa	*Iowa Code Annotated* §572.1 et seq. (1992 vol.; 1994 cum. supp.)	No	Yes, clerk of court mails copy of lien	No	No	No, owner can require suit to foreclose be commenced within 30 days	No	Yes 200%	No	No	No	NLT 90 days 2 years
Kansas	*Kansas Statutes Annotated* §60-1101 et seq. (1983 vol.)	No	No	No	No	Yes	No	Yes 100%	No	No	No	NLT 4 months 1 year
Kentucky	*Kentucky Revised Statutes* §376.010 et seq. (1972 vol.; 1992 cum. supp.)	No	Yes, copy NLT 7 days after filing	No	No	No	No	Yes 200%	No	No	No	NLT 6 months 12 months
Louisiana	Louisiana Statutes §9:4801 et seq. (volume of library's set missing) *Civil Code* Art. 2772 et seq. (1952 vol.; 1992 cum. supp.)									No		

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Maine	*Maine Revised Statutes Annot. (1964)* Title 10 §3251 et seq. (1980 vol.; 1993 cum. supp.)	No	No	No	No	Yes	No	Yes, in amount determined by judge in validity suit	No	No	No	NLT 90 days 120 days or 180 days if enforced by attachment
Maryland	*Annotated Code of Maryland* Real Property §9-101 et seq. (1988 Repl. vol.; 1993 cum. supp.)	Yes, petition in equity	No, principals at hearing, show cause order to owner	Yes, formal	N/A	N/A	Judge may require	Yes, judge specifies	Yes, show cause order to owner, interlocutory order of probable cause establishing lien	Yes	Yes	NLT 180 days 6 months
Massachusetts	*Massachusetts General Laws Annotated* Chap. 254 §1 et seq. (1988 vol.; 1994 cum. supp.)	No	No, lien by filing notice of written contract	No	No	No	No	Yes 100%	No	No, verification not required	No	NLT 30 days 60 days
Michigan	*Michigan Statutes Annotated* §26.316 (101) et seq. (1993 Repl. vol.)	No	Yes, copy NLT 15 days after filing	No	No	No	No	Yes 200%	No	No	No	NLT 90 days 1 year

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit required to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Minnesota	*Minnesota Statutes Annotated* §514.01 et seq. (1990 vol.; 1994 cum. supp.)	Yes	No	No	No	Yes	No	Yes approx. 120-160%	No	No	No	NLT 120 days 1 year
Mississippi	*Mississippi Code 1972, Annotated* §85-7-131 et seq. (1991 vol.; 1993 cum. supp.)	No	No, written contract may be filed	No	No	No, only on validity of lis pendens filed	No	No	No	No, verification not required	No	12 months
Missouri	*Vernon's Annotated Missouri Statutes* (1992 vol.; 1994 §429.010 et seq. cum. supp.)	No	No, notice with contract re: waivers	No	No	No	No	No	No	No	No	NLT 6 months 6 months
Montana	*Montana Code Annotated* §71-3-501 et seq. (1993 vol.)	No	No, extensive exceptions mitigate notice requirement	No	No	No	No	Yes 150%	No	Yes	No	NLT 90 days 2 years
Nebraska	*Revised Statutes of Nebraska 1943* §52-125 et seq. (1988 vol.; 1992 cum. supp.)	No	No, may give notice	No	No	No, owner may demand commencement of suit to foreclose	No	Yes 115%	No	No, verification not required	No	NLT 90 days 2 years
Nevada	*Nevada Revised Statutes* §108.221 et seq. (1991 vol.)	No	Yes, NLT 30 days after filing, not all owners have to be served	No	No	No	No	Yes 150%, requires bearing to substitute for lien	No	No, verified by oath, but no acknowledgement	No	NLT 90 days 6 months

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit required to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
New Hampshire	*New Hampshire Revised Statutes Annotated 1991* §447:1 et seq. (1991 vol.; 1993 cum. supp.)	No	No	No	No	No	No	No	No	No filing required	No filing required	continues 120 days after work done, then attachment may be had
New Jersey	*New Jersey Statutes Annotated* §2A:44-64 et seq. (1987 vol.; 1993 cum. supp.)	Yes, notice of intention to perform work	Yes, for notice of intention, NLT 5 days after; No, for actual lien claim	No	No	No, owner may demand commencement of suit to foreclose	No	Yes 200% bond, 100% cash + interest	No	No	No	NLT 4 months 4 months
New Mexico	*New Mexico Statutes 1978 Annotated* §48-2-1 et seq. (1987 Repl. pamphlet; 1993 cum. supp.)	No	No	No	No	No	No	Yes 100%+	No	No	No	NLT 120 days 1 year
New York	*McKinney's Consolidated Laws of New York Annotated* Chap. 33, Art. 2, §3 et seq. (1993 vol.; 1994 cum. supp.)	No	Yes, NLT 30 days after filing	No	No	Yes	No	Yes 200% 100% cash	No	No	No	NLT 8 months 1 year
North Carolina	*General Statutes of North Carolina* §44A-7 et seq. (1989 vol.; 1993 cum. supp.)	No	No	No	No	No, only adverse determination in suit to enforce	No	Yes 125% bond, 100% cash	No	No, verification not required	No	NLT 120 days NLT 180 days after last day worked

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
North Dakota	*North Dakota Century Code Annotated* §35-27-01 et seq. (1987 Repl. vol.; 1993 cum. supp.)	Yes, may record notice of intent to lien	Yes, by statute, must serve notice by cert. mail and record verified notice, but case law states it does not have to name owner of land	No	No	No, owner may demand commencement of suit to enforce within 60 days	No	No	No	No	No	NLT 90 days NLT 3 years after recording notice of intent
Ohio	*Page's Ohio Revised Code Annotated* §1311.02 et seq. (1993 Repl. vol.; 1993 cum. supp.)	No	Yes, NLT 30 days after filing	No	No	No, owner may demand commencement of suit within 60 days after service on lienor	No	No	Yes 200%, 150% for lien over $5,000	No	No	NLT 120 days 6 years
Oklahoma	*Oklahoma Statutes Annotated* Title 42 §141 et seq. (1990 vol.; 1994 cum. supp.)	No	Yes, NLT 1 day after filing, by county clerk	No	No	No	No	Yes 125%	No	No	No	NLT 4 months 1 year
Oregon	*Oregon Revised Statutes Annotated* §87.010 et seq. (1988 Repl. vol.; 1993 Repl. vol. missing from set)	No	Yes, NLT 20 days after filing	No	No	No	No, but can go against bond of registered builder	Yes 150% or $1000, whichever greater	No	No	No	NLT 75 days 120 days

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Pennsylvania	*Purdon's Pennsylvania Statutes Annotated* Title 49 §32 et seq., 49 §1101 et seq. (1965 vol.; 1994 cum. supp.)	No	Yes, NLT 1 month after filing	No	No	Yes, petition to strike off lien	No	Yes 200% bond, 100% cash	No	No, verification not required	No	NLT 4 months 2 years
Rhode Island	*General Laws of Rhode Island, 1956, Reenactment of 1984* §34-28-1 et seq. (1984 vol.; 1993 cum. supp.)	Yes, notice of intention to do work NLT 120 days after the doing of work	No	No	No	No	No	Yes 100%	No	No	No	NLT 120 days 120 days to file suit and lis pendens notice
South Carolina	*Code of Laws of South Carolina 1976* §29-5-10 et seq. (1991 Rev. vol.; 1993 cum. supp.)	No	Yes	No	No	No	No	Yes 133%	No	No	No	NLT 90 days 6 months
South Dakota	*South Dakota Codified Laws* §44-9-1 et seq. (1983 Rev. vol; 1993 cum. supp.)	Yes	Yes, Postal receipt for cert. mail must be attached and filed	No	No	No, may demand suit to enforce to commence within 30 days	No	No	No	Yes	No	NLT 120 days 6 years
Tennessee	*Tennessee Code Annotated* §66-11-101 et seq. (1993 vol.)	Yes, NLT 90 days after work	Yes	No	No	No	No	Yes 200%	No	No	No	NLT 90 days 90 days

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
Texas	*Vernon's Texas Codes Annotated* §53.001 et seq. (1984 vol.; 1994 cum. supp.)	No	Yes	No	No	No	No	Yes 200%, indemnifies, but doesn't release lien	No	No	No	NLT 120 days 2 years
Utah	*Utah Code Annotated* §38-1-1 et seq. (1988 Repl. vol.; 1993 cum. supp.)	No	Yes, NLT 30 days after filing	No	No	No	No	No	No	No	No	NLT 80 days 12 months after completion
Vermont	*Vermont Statutes Annotated* Title 9 §1921 et seq. (1993 vol.)	No	No	No	No	No	No	No	No	No, signature only	No	NLT 120 days 3 months
Virginia	*Code of Virginia 1950* §43-1 et seq. (1990 Repl. vol.; 1993 cum. supp.)	No	No, notice to mech. lien agent, but failure doesn't invalidate	No	No	Yes, *Va. Code §43-17.1* suit	No	No	No	No	No	NLT 90 days 6 months
Washington	*West's Revised Code of Washington Annotated* §60.04.010 et seq. (1990 vol.; 1994 cum. supp.)	No, in some cases, notice of right to lien	No, not in all cases; failure to notice doesn't invalidate	No	No	Yes, on motion re: frivolous lien, for order that lienor appear NLT 6-15 days after service	No	Yes, greater of $5,000 or 200%	No	No	No	NLT 90 days 8 calendar months

State	Citation/Notes	Pre-lien prior notice required	Notice to owner of filing general contractor lien required	Pre-deprivation hearing required	Immediate post-deprivation hearing required	Any post-deprivation hearing on lien validity	Lienor required to post protective bond	Lienee can free property by posting bond	Review and evaluation by judge prior to attachment of lien	Lien affidavit requried to contain significant facts	Two-sided proceeding for creation of lien (not *ex parte*)	When lien filed and Length of deprivation before lien extinguished by action of law
West Virginia	*West Virginia Code Annotated* §38-2-1 et seq. (1985 vol.; 1993 cum. supp.)	No	No	No	No	Yes	No	Yes 100% cash deposit after petition to circuit court	No	No	No	NLT 90 days 6 months
Wisconsin	*West's Wisconsin Statutes Annotated* §779.01 et seq. (1981 vol.; 1993 cum. supp.)	Yes, NLT 30 days before filing	Yes	No	No	No	No	Yes 125%, exception permits time to file suit after bond filed	No	No, signature only	No	NLT 6 months 2 years
Wyoming	*Wyoming Statutes Annotated* §29-1-201 et seq. (1981 Pampl.; 1993 cum. supp.)	Yes, 10 days' notice	Yes, promptly after filing	No	No	No	No	Yes 150%	No	Yes	No	NLT 120 days 180 days

Supreme Court, U.S.
FILED
JUN 27 1994
OFFICE OF THE CLERK

(2)

No. 93-1910

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, et. al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT JOYCE E. HORTON

J. Charles Curran
Counsel of Record for
Respondent
Joyce E. Horton
9695 C Main Street
Fairfax, Virginia 22031
(703) 764-0600

34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied due process and/or equal protection of the laws by a decision of a trial court so as to entitle him to a Writ of Certiorari when the decision of that trial court that was not timely appealed under the provisions of the Code of Virginia and the rules of the Supreme Court of Virginia?

2. Is the Petitioner entitled to a Writ of Certiorari from the Supreme Court of the United States on issues not presented in his Notice of Appeal filed in the Supreme Court of Virginia?

3. Is the Petitioner entitled to a Writ of Certiorari when the Virginia Supreme Court has not decided any question of federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States or the highest courts of other states?

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LIST OF PARTIES TO THIS PROCEEDING

1. Petitioner: Kendall H. Breedlove

Respondents: Calvin W. Phillips

Joyce E. Horton

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, et. al.,

Respondents

BRIEF IN OPPOSITION OF
RESPONDENT JOYCE E. HORTON

COMES NOW the Respondent Joyce E. Horton, by counsel, and respectfully prays that this Honorable Court deny the Petitioner's Petition For Writ of Certiorari for the reasons stated below.

STATEMENT OF THE CASE

Respondent Joyce E. Horton first takes exception to the list of parties set forth in The Petition For Writ Of

Certiorari to the extent that James H. Horton is named as a party to this proceeding. As stated in the Petition, this case arises out of an action brought by Petitioner in the Circuit Court of Fairfax County, Virginia (At Law No. 117967) in twelve counts; ten counts sounding in defamation and two counts sounding in civil conspiracy. James H. Horton, the husband of respondent Joyce E. Horton was named as a party defendant only in the conspiracy counts, but not in the defamation counts.

By order of October 30, 1992, the trial court dismissed the ten defamation counts on demurrer of the defendants without leave to amend and dismissed the two conspiracy counts with leave to amend. Petitioner subsequently filed an amended Motion For Judgment amplifying the two conspiracy counts. Petitioner voluntarily

nonsuited the two conspiracy counts in Amended Motion For Judgment by order dated July 16, 1993 (Petition For Writ Of Certiorari at p. 8, ¶ 14). Petitioner's application for a writ seeks review of the decision of the trial court in dismissing the ten defamation counts on demurrer. Accordingly, James H. Horton is not a party to this proceeding.

Respondent Horton takes exception to the characterizations contained in the Petition For Writ of Certiorari as false, etc. Respondent also takes exception to the Petitioner's position that he submitted any evidence in the case from which this appeal arises as stated in the Petition at p. 6, ¶ 8. The case below was decided upon demurrer and no evidence was taken.

Petitioner also refers to certain decisions of the Arlington County Circuit

Court as res judicata. Those decisions are not res judicata in this matter as there is neither an identity of the parties with those in this action nor an identity of causes of action.

Lastly, Respondent would direct the Court's attention to the Petitioner's admission at P. 10, ¶ 22 of the Petition wherein it is stated that Petitioner filed his Notice of Appeal from the "letter ruling" of the trial court on July 19, 1993 and to Petitioner's admission of the entry of the Final Order by the trial court on September 17, 1993 (Petitioner's Exhibit 3, p. A6).

SUMMARY OF ARGUMENT:

(1) Petitioner's appeal was premature.

The Petition should be dismissed because the appeal from the decision of the trial court to the Supreme Court of

Virginia was premature and was not timely.

Petitioner filed his Notice of Appeal on July 19, 1993, almost one month before the actual date of entry of the Final Order, September 17, 1994. Since the trial court speaks only through its orders, and not through letters advising the litigants of the opinion of the trial judge, there was no appealable final order existing on July 19, 1993.

(2) The Petition contains new matter not included in the appeal below.

The appeal below arose from the denial of the Petitioner's Petition To Rehear in the trial court (excerpted in Petitioner's Exhibit 13). After the rehearing was denied by the trial court, and after filing and arguing a Petition For Appeal before the Supreme Court of Virginia, Petitioner first raised the constitutional issues of due process and

equal protection in his attempt to gain a rehearing from the Virginia Supreme Court.

(3) There is no conflict among the decisions of the states highest courts.

There is no conflict among the highest courts of Virginia and Missouri and others. Petitioner's argument that Laun v. Union Electric Co. of Missouri, 350 Mo. 572, 166 S.W. 2d 1065 (1942) is in conflict with the Supreme Court of Virginia's decision in Donohoe Construction Co., Inc. v. Mount Vernon Associates, 235 Va. 531, 369 S.E. 2d 857 (1988) is incorrect. Laun is factually distinguishable because in this case, both defendants Phillips and Joyce Horton were alleged by Petitioner to have defamed Petitioner and his property by filing certain mechanic's liens and a "partial release of mechanic's lien".

ARGUMENT

(1) Petitioner's appeal was premature.

Petitioner asserts that the "order" from which he appealed to the Supreme Court of Virginia is the "letter ruling" of the trial judge dated July 5, 1993 (Petitioner's Exhibit 2). This position is erroneous for two reasons: first, a court in Virginia speaks only through its orders, and secondly, the very terms of the "letter ruling", as reproduced by Petitioner, indicates that "Mr. Curran should prepare an appropriate order (emphasis added) reflecting this ruling, and send it to Mr. Breedlove for approval as to form, preserving all objections" (Petitioner's Exhibit 2).

Petitioner filed his Notice of Appeal on July 19, 1993, almost one month before the actual date of entry of the Final Order, September 17, 1994.

Pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, "the date of entry of any final judgment, order or decree is the date the judgment, order or decree is signed by the judge". Rule 5:1 (b) (13) of the Rules of the Supreme Court of Virginia contains a similar provision, "the 'date of entry' of any final judgment or other appealable order or decree shall be the date the judgment, order, or decree is signed by the Judge".

Further, Rule 5:9 (a) provides that "No appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order, counsel for the appellant files with the clerk of the trial court a notice of appeal..." (emphasis added).

It has been frequently held in Virginia that a court speaks only through its orders. Accord: Cunningham v. Smith,

205 Va. 205, 135 S.E.2d 770 (1964); Walker v. Commonwealth, 225 Va. 5, 135 S.E.2d 770 (1983). The Virginia Supreme Court has also distinguished the rendition of a judgment from the entry of that judgment. See: McDowell v. Dye, 193 Va. 390, 69 S.E.2d 459 (1952). It is this distinction that Petitioner's argument implicitly fails to acknowledge. The trial court in this matter made a ruling in letter form, however, no final order was entered by the trial court until September 17, 1993.

Pursuant to Rules 1:1, 5:1 (b) (13) and 5:9 (a) of the Supreme Court of Virginia, the Notice of Appeal filed by Petitioner was premature because there was no final order in existence on July 19, 1993, the date of the filing of the Notice of Appeal. The letter of the Circuit Court Judge is not a "judgment, order or decree" within the contemplation of the

Rules of the Supreme Court of Virginia.

In addition, the plain language of the letter from the trial judge contemplated the preparation and entry of an "order", particularly to protect the Petitioner's right to object thereto. (Please see Petitioner's Exhibit 2).

After the entry of the Final Order of the trial court on September 17, 1993, Petitioner could have noted his appeal, but did not do so. Accordingly, the Supreme Court of Virginia did not err in denying the Petitioner's appeal by its order of January 13, 1994.

Because Petitioner failed to comply with the Rules of the Supreme Court of Virginia in regard to the timely filing of his appeal, he had no absolute right to be heard. Therefore, it follows ipso facto that the denial of his requests for rehearing by the Supreme Court of Virginia

did not deny the Petitioner either due process or equal protection.

The Virginia Code section on rehearing of matters decided by that court, Va. Code §8.01-675.2, provides that rehearing is to be granted only if one of the justices who decided the case adversely certifies that there is good cause for the rehearing.

Petitioner cites the decision of this Court in Coleman v. Thompson, 501 U.S. __, 115 L Ed 2d 640, 111 S Ct 2546 (1991) for the proposition that the action of the Virginia Supreme Court abridged his constitutional right to have his underlying claim heard by a jury. Coleman, however, stands for the principle that this Court

"... will not, review a question of federal law decided by a state court if the decision of that court rests upon a state law ground that is independent of the federal question and adequate to

support the judgment." Id, at 501 U.S.__, 115 L Ed 2d 655, 111 S Ct ___.

Since the decision of the Supreme Court of Virginia was supportable upon a ground independent of the federal questions raised, the Writ should not be granted to review that decision.

(2) The Petition contains new matter not included in the appeal below.

Petitioner first claimed that his constitutional rights were abridged only after denial of his Petition For Appeal by the Virginia Supreme Court. The Virginia Supreme Court, however, accorded Petitioner full due process and access to the courts of Virginia. Petitioner seeks to obtain a review of the merits of his underlying claim in this application for a Writ of Certiorari.

This appeal arises from the refusal of the Supreme Court of Virginia to grant rehearing to Petitioner after denying his Petition For Appeal following oral argument. The underlying appeal was concerned only with the trial court's failure to rehear its decision to dismiss the ten defamation counts without leave to amend.

Following the filing of his appeal, Petitioner was granted oral argument before the Virginia Supreme Court on December 17, 1993 on that matter. After denial by the Virginia Supreme Court of the Petition For Appeal, Petitioner sought rehearing at least twice more from the Virginia Supreme Court. That court, in accordance with its Rule 5:20, considered the petitions for rehearing without argument and denied same.

Petitioner received the process that

was due him and received full access to the courts of Virginia. Further, since Petitioner's appeal was premature and did not appeal from a "final order" as discussed above, Petitioner cannot demonstrate that he had any due process or equal protection right to be heard. Had Petitioner availed himself of an appeal after the entry of the order of the trial court dated September 17, 1993, he would then have been able to argue issues involving both the merits of the underlying claim and issues of constitutional protection.

Petitioner argues that the decision of this Court in Connecticut v. Doehr, 501 U.S. ___, 115 L Ed 2d 1, 111 Sup. Ct. __ (1991) guarantees a hearing before an impartial tribunal before being deprived of a significant property interest and that the mechanic's lien statutes of

Virginia as applied to Petitioner deny him due process (Petition at p. 14, ¶ I(1)(a), et. seq.).

Mechanic's liens, however, are not like the pre-judgment attachment attacked in Doehr, where the person seeking the attachment had no interest in the real property affected. Mechanic's liens are inchoate liens until perfected. This distinction was recognized in the separate opinion in Doehr of Chief Justice Rehnquist and Justice Blackmun, as follows:

> "Materialman's and mechanic's lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. ... To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes". Id, at 501 U.S. ___, 115 L Ed 2d 24, 111 Sup. Ct. ___.

The constitutionality of the Virginia mechanic's lien statute was challenged on

due process and equal protection grounds and the statute withstood constitutional scrutiny. See: In Re Thomas A. Cary, Inc. 412 F. Supp 667 (E.D. Va. 1976). Quoting from Spielman-Ford, Inc. v. Hanson's, Inc., 379 F. Supp 997 (D. Ariz. 1973), aff'd 417 U.S. 901, 94 Sup. Ct. 2596, 41 L. Ed 2d 208 (1974), the In Re Thomas A. Cary, Inc. Court noted:

"Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interests of the property owner. The right to alienate has not been harmed, and the difficulties which the lien creates may be ameliorated through the use of bonding or title insurance. Spielman-Ford, supra, at 999."

The Respondent Horton respectfully submits that this Court decline Petitioner's suggestion that the Court review the mechanic's lien statutes of the 50 states and the District of Columbia.

(3) There is no conflict among the decisions of the states' highest courts.

Petitioner argues that the decision of the Missouri Supreme Court in Laun v. Union Electric Co. of Missouri, 350 Mo. 572, 166 S.W. 2d 1065 (1942) is in direct conflict with the decision of the Supreme Court of Virginia in Donohoe Construction Co. v. Mount Vernon Associates, 235 Va. 531, 369 S.E. 2d 857 (1988) justifying the granting of a Writ in this matter. Although Respondent Horton submits that the Court should not grant a Writ in this matter for the reasons set forth above, it is also submitted that there is in fact no conflict between Laun and Donohoe.

Petitioner further suggests that the factual circumstances of the Laun case are virtually identical with those in the underlying controversy and that had the holding of Laun been applied, some or all

of the respondents below may not have been able to take advantage of the privilege.

The Missouri Supreme Court held in Laun that the absolute privilege against defamation accorded to parties to a lawsuit did not apply to other alleged publishers who claimed to be interested in, although not parties to the suit. Id at 582, 1071.

In Donohoe Construction Co, Inc. v. Mount Vernon Associates, 235 Va. 531, 369 S.E.2d 857 (1988), the Supreme Court of Virginia held that the filing of a mechanic's lien constitutes a judicial proceeding entitled to an absolute privilege against an action for slander of title when the statements contained in the memorandum were "relevant and pertinent" to the case. In the present matter, the allegations made against respondent Joyce Horton are that she, acting in her

individual and representative capacities, defamed Petitioner and his property by filing the "partial release of mechanic's lien" (Petition at p. 6, ¶ 8).

Petitioner concedes that the memoranda of lien that are the subject of this case were filed in conformity with § 43-5, Code of Virginia (Petitioner's Exhibit 14 at p. A30), but he attempts to distinguish the holding of Donohoe by suggesting that while the statements contained in the memorandum of mechanic's lien are not protected because those statements were false. In addition to the lack of any evidence in the record of facts to support this contention, Petitioner's interpretation of Donohoe is not supported by a careful reading of that decision.

In Donohoe, the Virginia Supreme Court had ample opportunity based on the

facts before it to find that the amount claimed in the memorandum of lien was false in that a requisition for less than one-half of the amount liened was submitted to Mount Vernon by Donohoe only three days after the filing of the lien memorandum. The trial court had determined that "Donohoe knew or should have known that it was filing its lien improperly". Id at 536. In addition, the record contained documents that "showed that Donohoe had considered filing a lien to prevent closing on permanent financing and to force Mount Vernon into a final settlement" Ibid. Nevertheless, while the lien was found to be invalid, in Donohoe, the Court held that the statements made in the memorandum of mechanic' lien were absolutely privileged.

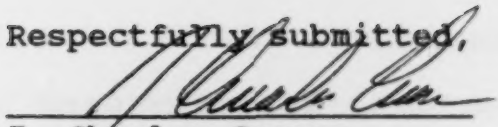
Since respondent Joyce E. Horton was allegedly a party to the filing of a

mechanic's lien and a partial release of mechanic's lien, any privilege that she enjoys under Donohoe, supra is not inconsistent with the holding of Laun, supra.

CONCLUSION

Respondent Joyce E. Horton respectfully prays that this Court deny the application of Petitioner for a Writ of Certiorari on the ground that the Petitioner had no right under the applicable statutes and rules of court of Virginia to have an appeal heard at the time the underlying appeal was held, on the ground that Petitioner has not been denied his rights of due process and equal protection and on the ground that there is no conflict among the highest courts of the states of Virginia and Missouri on the issues in this matter.

Respectfully submitted,



J. Charles Curran
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(703)764-0600

Certificate of Service

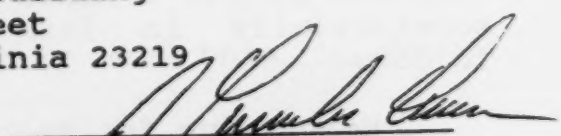
I hereby certify that I mailed three (3) copies of the Brief In Opposition of Respondent Joyce E. Horton by first class mail, postage prepaid, in accordance with Rule 29.3 of the Rules of the Supreme Court of the United States, this 27th day of June, 1994, to:

Mr. Kendall H. Breedlove, Petitioner
2831 Gallows Road
Suite 145
Falls Church, Virginia 22042

Mr. Calvin W. Phillips, Respondent
310 Maple Avenue West
Suite 198
Vienna, Virginia 22180

and pursuant to Rule 29.4 (c) of the Rules of the Supreme Court of the United States, citing that 28 U.S.C. §2403 (b) may be applicable, I mailed three (3) copies by certified mail, postage prepaid, as follows:

The Honorable Stephen D. Rosenthal
Attorney General of the Commonwealth
of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219



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APPENDIX

Cited Provisions from the Code of Virginia

Virginia Code (1950) §8.01-675.2 Rehearing. -- The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing. However, a notice of petition for rehearing shall be filed as soon as provided by the Rules of Court and the petition for rehearing shall be filed within thirty days after the entry of the judgment with the clerk, who shall note the date of such filling on the order book. The judgment resulting from any such rehearing shall be entered forthwith by the clerk who shall transmit a certified copy thereof to the clerk of the court below, to be entered by him as provided by §8.01-685.

Virginia Code (1950) §43-5. Sufficiency of memorandum and affidavit required by §43-4. -- The memorandum and affidavit required by §43-4 shall be sufficient if substantially in form and effect as follows:

Memorandum for Mechanic's Lien
Claimed by General Contractor.

Name of owner: .....
Address of owner: .....
Name of claimant: .....

Address of claimant: .....
1. Type of materials or services furnished: .....
2. Amount claimed: .....
3. Type of structure on which work done or materials furnished: .....
4. Brief description of property: .....
5. Date from which interest on above amount is claimed: .....
Date:.....

.....
(Name of Claimant)

Affidavit

State of Virginia:
County (or city) of ....., to-wit:

I, _____, (notary or other officer) for the county or city aforesaid, do hereby certify that ..... claimant, or..... agent for claimant, this day made oath before me in my county or (city) aforesaid that .....(the owner) is justly indebted to claimant in the sum of .....(dollars), for the consideration stated in the foregoing Memorandum, and that the same is payable as therein stated.

Given under my hand this ___ day of_ _____, 19__.

.....(Notary Public or Magistrate, et cetera)

Rules of the Supreme Court of Virginia:

Rule 1:1 Finality of Judgments, Orders and Decrees. All final judgments, orders and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated or suspended for twenty-one days after the date of entry and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

Rule 5:1 Scope, Applicability and General Provisions. ...(b) Definitions: (13)
The 'date of entry' of any final judgment or other appealable order or decree shall be the date the judgment, order, or decree is signed by the judge.

Rule 5:9. Notice of Appeal
(a) Timeliness -- No appeal shall be allowed unless, within 30 days after the entry of a final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

Rule 5:20. Denial of Appeal: Petition For Rehearing. When a petition for rehearing is denied, the clerk of this Court shall mail a copy of the order denying the appeal to counsel for appellant and counsel for the appellee. Counsel for the appellant may, within 14 days after the date of this notice, file in the office of the clerk of the Court a petition for rehearing not to exceed 15 typed or printed pages in length. The petition shall state that a copy has been mailed or delivered to counsel for the appellee. Eight copies shall be filed. Carbon copies are acceptable. Oral argument on the petition for rehearing will not be allowed. No responsive brief shall be filed unless requested by this Court. The Clerk of this Court shall notify counsel for the appellant and counsel for the appellee of the action taken by this Court on the petition for rehearing.

(3)

Supreme Court, U.S.
FILED
AUG 30 1994
OFFICE OF THE CLERK

No. 93-1910

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT FOR CERTIORARI

Kendall H. Breedlove, *pro se*
2831 Gallows Road
Suite 145
Falls Church, Virginia 22042

August 30, 1994

36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court propound a standard for judicial use in applying the original and updated, *Doehr*-versions of the three-part test for constitutional Due Process of *Mathews v. Eldridge*, 424 US 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976)[1]?

2. Should the Court propound an augmented fourth part to the three-part *Mathews* test for private-party-initiated deprivations—to consider security safeguards against *malicious* abuse or perversion of law to unwarranted ends: (a) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (b) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (1) for swiftly setting right the malicious deprivation, and (2) for redressing the damages?

---

[1] The *Mathews* test was updated to address private-party-initiated deprivations in *Connecticut v. Doehr*, 501 US —, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991).

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KENDALL H. BREEDLOVE, Petitioner

v.

CALVIN W. PHILLIPS, *et al.*, Respondents

On Petition For A Writ Of Certiorari
To The Supreme Court of Virginia

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully submits this *Supplemental Brief in Support of Petition for a Writ of Certiorari*, pursuant to Supreme Court Rule 15.7. This supplemental brief arises from the decision of June 24, 1994, by this Court of *Dolan v. City of Tigard*, slip op., and the final *order* on June 24, 1994, by the Circuit Court of Arlington, Virginia, dismissing upon *demurrer* Petitioner's five-count suit for malicious prosecution, abuse of process, and civil conspiracy, arising from the instant false mechanics' liens.

STATEMENT OF THE CASE

1. *Breedlove v. Phillips, et al.*, on which the instant *petition for certiorari* was filed, contained 10 defamation counts arising from three false mechanics' liens filed in the false, fictitious, *feigned* name of, or claiming under the prior lien of, a not-in-life claimant—*Dennis Anderson*—with a false claimant address, for a false amount, with a perjured oath and forged signature. The Circuit Court of Fairfax County, Virginia, dismissed these 10 defamation counts upon *demurrer* on October 30, 1992, under the rule of *Donohoe Constr. Co. v. Mount Vernon Associates*, 235 Va. 531, 369 S.E.2d 857 (1988) (hereinafter *Donohoe*) granting absolute privilege to mechanics' liens as judicial actions, regardless of their being sham or their abuse of privilege, and pleaded as such.

2. *Donohoe* also establishes the Virginia judicial procedure for seeking redress of such false, libelous, malicious mechanics liens through the route of obtaining *Virginia Code §43-17.1* adjudications of the liens' invalidity, and then suing for malicious prosecution or abuse of process. Petitioner followed this route in the Circuit Court of Arlington, Virginia, concerning these instant liens. Petitioner successfully obtained two *§43-17.1* adjudications in the Arlington Circuit Court in February and April, 1993. Petitioner then brought a five-count suit at law in Arlington on July 15, 1993, styled *Breedlove v. Hart, et al.*, for malicious prosecution, abuse of process, and civil conspiracy, pursuant to the Virginia judicial procedure established in *Donohoe*, for the redress of libelous, or fraudulent, or malicious mechanics' liens, which was dismissed on *demurrer* on June 24, 1994. The constitutionality of this *Donohoe* procedure, for the redress of false, libelous, malicious mechanics' liens, is challenged in the instant *petition for certiorari.*

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. *Certiorari Should Be Granted Because This Case Provides the Basis for the Court to Propound a Standard for Judicial Use in Applying original and updated, Doehr versions of the Mathews test.*

1. The three-part *Mathews* test for constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage, which was updated in *Connecticut v. Doehr*, 501 US —, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991) should be provided a *standard* for its application in Fourteenth Amendment deprivations, to guide judges in assessing Due Process provisions of various statutes, regulations, ordinances, customs or usages. The needed *standard* is described by the Petitioner as the **"rough parity of procedural burden."** Such a standard would be consistent with the "rough proportionality" standard for Fifth Amendment takings of *Dolan v. Tigard*, slip op., (1994).

2. The Petitioner's circumstances will serve as an example to demonstrate the derivation of this proposed *standard.* The Petitioner, in the underlying action, was deprived of significant property interests in his house in Arlington, Virginia, by: (a) an initial false, malicious mechanics' lien signed, sworn to, and filed in the false, fictitious, *feigned* name of a not-in-life claimant—*Dennis*

Anderson—with false claimant address, false amount, perjured oath, and forged signature; and (b) a second false, malicious mechanics' lien, in a *different* claimant name, claiming under the initial mechanics' lien and employing the initial *D. Anderson* false lien as true, also for false amount, contained within an alleged "certificate of partial release of mechanics' lien," without the requisite *affidavits* for legal holder status or for partial payment, required by *Virginia Code* §43-67 and its referenced *§55-66.3* and *§55-66.4* for the release of liens. Both liens were employed in an extortion attempt against the Petitioner. Each lien was filed without Due Process — without notice and without an opportunity for the lienee (the Petitioner) to be heard prior to the liens attaching.[1]

a. Plaintiff filed two chancery suits under *Virginia Code §43-17.1*, challenging the validity of each of these two mechanics' liens. In each instance, the Arlington Circuit Court ruled that each lien "is and was invalid," in orders of February and April, 1993.

b. The Arlington Circuit Courty rendered both *Virginia Code §43-17.1* decisions prior to the *Petition to Rehear* the *demurrer* in the Fairfax case (the instant action of this *petition*) for the 10 defamation counts. The Petitioner's memorandum in support of his *Petition To Rehear* in Fairfax, included quotations of the Arlington Court's holdings in the *§43-17.1* suits, that each lien "is and was invalid." Despite this support for the Petitioner's pleading of the liens being sham and absolute privilege being abused, the Fairfax Court denied the *Petition To Rehear*, leading to the instant appeal.

c. Until the final court order freeing the Plaintiff's liened Arlington property from *custodia legis*, 17 months had elapsed during which the Plaintiff was deprived of some of the sticks in the bundle of rights known as property, constituting deprivation of significant property interests by these liens.

d. Had the Petitioner not had the capability to pursue these two chancery suits *pro se*, the Petitioner estimates that his would-

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[1] "The right to prior notice and a hearing is central to the Constitution's command of due process." [*U.S. v. James Daniel Good Real Property*, — U.S. —, — L.Ed.2d. —, 114 S.Ct. 492, at 500 (1993).]

be-equivalent legal fees for the required *§43-17.1* litigation would have been about $40,000, allocated about $20,000 to each suit.

3. For the persons who filed these two false, invalid mechanics' liens against Petitioner, the burden of their predeprivation procedure to create these false liens was $13.00 for the initial false mechanics' lien and $10.00 for the subsequent lien, contained within an alleged "certificate of partial release of mechanics' lien," plus about one-half hour of time for preparing each lien. In addition, there would be a $1 notary fee for each lien to make the perjured oath in the *affidavit* of the memorandum.

4. For the Petitioner to undo these two false, invalid mechanics' liens, required the would-be-equivalent in legal fees of $40,000 and 17 months, during which time Plaintiff's liened Arlington property was seized and held in *custodia legis*.

5. Thus, in the Petitioner's circumstances, there was *not* "rough parity of procedural burden" upon the lienor and the lienee; their respective procedural burdens were lopsidedly imbalanced.

6. Principles of due process and equal protection under law, embodied in the concept "rough parity of procedural burden," dictate that the State should not favor unduly either side of a private dispute. **In the instant circumstances, there can be no dispute with a false, *feigned*, not-in-life, fictitious person and no assertion that a not-in-life, fictitious person has any *interest* in the Petitioner's property.** However, permitting malicious persons to create and maintain two liens on the Petitioner's property for $25 and an hour's time—in the name of a not-in-life fictitious person—which requires the equivalent of $40,000 in litigation and 17 months to undo these liens, is the equivalent of the State arming the lienor with a broadsword and arming the lienee with a penknife.

7. It became clear during the unfolding of the extortion attempt, that for their extortion to work, the malicious perpetrators counted on the tremendous difficulty for the lienee victim (the Petitioner herein) to free his properties from the liens. Having double-liened one of Petitioner's properties in Arlington, they then proceeded to double-lien another of Petitioner's properties in Prince William County, Virginia, and filed suit to enforce on the first, double-liened

Arlington property. Faced with the legal costs of defeating the false liens, the lienee (the Petitioner) would capitulate to the extortionary demands. Thus, four false mechanics' liens were involved, three of which were in the name of or claimed under the lien of a not-in-life fictitious person. The May 7, 1992 false lien against Petitioner liened a Prince William County property then belonging to another owner, clouding that owner's title.[1] The property had been sold and the deed recorded six weeks before the false May 7, 1992 lien was filed. The transfer was made in a conditional sale under a title insurance exception to the initial January 14, 1992 *Dennis Anderson* mechanics' lien, while still in *custodia legis*, but prior to the subsequent May 7, 1992 false lien. The Respondents perpetrated these two double-lienings after Petitioner advised them twice in writing of the false, illegal nature of the initial round of liens and twice verbally, in response to telephone demands for $50,000, that no such debt was owing.

8. Petitioner has now been engaged in 2 and 1/3 years of intense litigation, seeking redress for the damages caused by these liens, including the instant *petition* of one branch of the litigation to the United States Supreme Court. Petitioner now estimates that his would-be-equivalent legal fees for the litigation to date would approximate $475,000. The end result of this litigation is that **Petitioner's every cause of action for redress**—through common-law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process, and civil conspiracy—**has been dismissed at the Virginia trial court level,** upon *demurrer*, before any cause of action or punitive damage claim could reach a jury.

9. Further elaboration of the proposed *standard* of "**rough parity of procedural burden,**" set forth by the Petitioner in paragraphs I. 1 and I. 5 above, involves the standard's interpretation. The proposed *standard*, "rough parity of procedural burden," as

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1 "The *ex parte* preseizure proceeding affords little or no protection to the innocent owner." [*U.S. v. James Daniel Good Real Property, id.*, at 502.] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941) held: (a) Virginia mechanics' liens must name the owner of record, (b) it is incumbent upon a lien claimant to ascertain the name and address of the owner of record from the public records, and (c) the lien is void if it fails to name the owner of record.

applied to balancing predeprivation safeguards against postdeprivation safeguards or remedies, should be interpreted to mean either:

a. If the State makes it very easy to deprive someone of a constitutionally-protected interest, the State must make it equally easy to challenge and to undo an erroneous or malicious deprivation. For example, the lienee should be permitted to file a one-page, sworn "denial of mechanics' lien," for $13.00 fee, which releases the property from lien and shifts the burden of establishing the lien to the lienor, in a full judicial hearing before a judge, if the lienor wishes to pursue the lien.

b. Or, conversely, if the State makes it very difficult for someone deprived of a constitutionally-protected interest to challenge and to undo an erroneous or malicious deprivation, then the State must make it equally difficult for that deprivation to occur and must provide for remedy of lienee damages. For example, a full judicial hearing before a judge with a lien attaching only upon signed order from that judge, as in Hawaii and Maryland currently.

10. Within the procedural spectrum delineated in paragraphs I. 9a and I. 9b, above, many equilibrium points exist at which the rights and burdens of good-faith lienor and lienee may be in rough *parity*. There must also be equilibrium points where further balance, or *parity*, is achieved: where the burdens upon the *malicious* lienor are appropriately deterrent, while the burdens upon the wronged lienee are sufficiently light as to thwart extortionate use of state lien statutes. It is inappropriate, and unconstitutional, for the State to create constitutionally-defective laws and judicial procedures which are inadequate and which facilitate extortionate conduct.[1]

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[1] "...but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The Constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any 'abuse' of state power. * * * In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation *without due process of law*—without adequate procedures." [*Daniels v. Williams*, 474 US 327, at 338-9, 88 L.Ed.2d 662, at 673, 106 S.Ct. 662 (1986).]

11. Thus, the *standard* for determining in a *Mathews* test if a particular set of circumstances is in such balance should be the "**rough parity of procedural burden,**" which goes to the heart of procedural due process.

12. Both the Virginia mechanics' lien law and the Virginia judicial procedure for the redress of false, libelous, malicious mechanics' liens, set forth in *Donohoe, supra,* fail to comport with the *standard,* "rough parity of procedural burden."

II. *Certiorari Should Be Granted Because the Establishment of a Standard for the Mathews Test Would Assist Judges in Evaluating the Import of Requirements for Bonds as Part of Due Process.*

1. In *Doehr, supra,* the plurality and the dissent addressed the question of whether Due Process required the posting of a bond by the lienor. Lienor bonds are part of *security safeguards against abuse* and of *remedial procedures.*[1] Related to this question is the issue of whether the State lien law permits the liened property to be freed from lien by substitution of a bond by the lienee. Lienee bonds are part of postdeprivation remedies.

2. The proposed *standard,* "**rough parity of procedural burden**" is quite useful in considering the issue of the lienee being able to free his property from lien by substituting a bond, and a related issue of the lienor being required to post a bond to protect against the damage of unwarranted deprivation by the lien.

3. Drawing upon the mechanics' lien laws of the fifty states, 39 states permit the substitution of a bond to free the property from mechanics' lien: 12 states prescribe a 200% bond, 10 states prescribe a 150% bond, 5 states prescribe bonds of 125-150%, 7 states prescribe 100% bonds, and 5 states prescribe various other bond surety amount requirements (see Exhibit 25, pp. A-53 to A-

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[1] A complete judicial *approach* consists of: (a) a *methodology*, (b) one or more *standards*, (c) *user-instructions*, (d) *update-guidance*, (e) *error-safeguards*, (f) *security-safeguards against abuse*, and (g) *remedial procedures* for error correction and for redress of damages. For more on this subject, see syllogistic system at Appendix Exhibit 1, section B, page A-2.

63, of the original *Petition for Certiorari*). Thus, a majority of those states (22 out of 39 states) permitting substitution of a lienee bond for a lien on property, prescribe a bond amount of 150% or more of the lien claim amount. The Virginia mechanics' lien law is one of the 11 states that does not provide that the lienee may free his property from lien by substituting a bond. Even had Virginia statute permitted "release by bond," the collateral requirements for the bond make the procedure impractical and unconstitutional. Such "release by bond" does not comport with the *standard*, **"rough parity of procedural burden."**

a. According to a Virginia bonding surety with whom the Petitioner discussed the problem, to obtain a 150% bond to satisfy the majority of state mechanics' lien lienee-bond requirements, the Petitioner would have had to pledge $2 *cash* for every $1 value guaranteed by the surety under the bond. Table 1 shows the cash requirements imposed upon the lienee to obtain a lienee bond for the Arlington house, sufficient to satisfy a 150% bonding requirement, prevalent in a majority of states permitting such bond.

Table 1. Cash Requirements to Satisfy Release by 150% Bond

Lien	Lien Amount	150% Bond Amount	Cash Collateral Amount	Bond Premium Fees	Total Cash Required
Nov. 27, 1991 lien	$51,768	$77,652	$155,304	$19,413	$174,717
May 22, 1992 lien	$13,014	$19,521	$39,042	$4,880	$43,922
Totals	$64,782	$97,173	$194,346	$24,293	$218,639

b. Thus, the mechanics' lienor being able to create one Virginia mechanics' lien for $13.00 filing fee, as compared to the Petitioner as a mechanics' lienee being unable to free his Arlington property from lien except through expensive litigation (*i.e.*, equivalent to $20,000 in legal fees for each lien-validity suit) in which the lienee must bear the burden of proving the *invalidity* of the lien (which is presumed to be valid); or, having to come up with $218,639 total *cash* for collateral and substantial non-refundable bond premium fees to secure one 150% bond to release the

Arlington property from the initial and subsequent liens—had Virginia had a statute equivalent to 22 other states permitting such a release by substitution of a 150% bond—does not comport with the *standard*, **"rough parity of procedural burden."**

c. In hostile, malicious, extortionate circumstances, as in the instant case, such purported avenue of release of property by lienee bond is instead a coercion—a lopsided and unconstitutional imbalance of procedural burden—facilitating extortion, because if the lienee is able to lift the *initial* mechanics' lien by providing a bond, he must still contend with any *additional* or subsequent lien which the malicious lienor may then file.

d. Furthermore, state mechanics' lien statutes generally provide that substitution of a bond for the liened property might only be employed for the release of a mechanics' lien *prior* to the lienor's filing of a suit to enforce. No such release by bond would be permitted after a suit to enforce was filed. Thus, *no* amount of cash—even the massive amounts in Table 1, above—could have secured the release of the Arlington property from the extortionary mechanics' liens and May 26, 1992, suit to enforce by Respondent Phillips, even had Virginia statutes permitted release by substitution of lienee bond.

4. If the lienor pursues the extortion, escape by the lienee-victim is impossible. The lienor just keeps filing false liens: as each one is lifted by the lienee posting a bond, another false lien takes its place; or, the lienor files suit to enforce, which makes it impossible to obtain any bond. It is such severe and unconstitutional imbalance of procedural burdens and costs, lopsidedly in favor of the lienor, which permits extortionate use of Virginia lien statutes. The lack of any deterrents against abuse and the lack of any viable redress procedures in the Virginia state mechanics' lien law *promotes* extortionate use of the Virginia lien statute and judicial procedure.[1]

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[1] Connecticut argued in *Connecticut v. Doehr, supra*, that its state statute for wrongful use of civil procedure, providing double and triple damage provisions was adequate postdeprivation safeguard against erroneous deprivation in prejudgment attachment, and obviated the need for predeprivation due

III. *Certiorari Should Be Granted Because the original and the updated, Doehr-version Mathews Test Addresses Only Erroneous Deprivations and Not Wilful or Malicious Deprivations and Requires Augmentation of Its Criteria To Do So.*

1. The three parts of the updated, *Doehr*-version, *Mathews* test consider the following *criteria*: (a) the private interests affected; (b) error control safeguards: (1) the predeprivation safeguards against *erroneous* deprivation, and (2) the postdeprivation safeguards against *erroneous* deprivation, including procedures for correcting the error; and (c) the interest of the private party seeking the prejudgment remedy with due regard for any ancillary interest the government may have and the impact upon the state of providing additional safeguards.

2. The three-part updated, *Doehr*-version, *Mathews* test **fails to consider** a *fourth* group of *criteria*—security safeguards against *malicious* abuse or perversion to unwarranted ends: (a) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (b) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (1) for swiftly setting right the malicious deprivation, and (2) for redressing the damages.

3. Supreme Court cases reveal an evolving judicial *approach* to Due Process and property; Federal and State cases show that the *Mathews* test and the updated, *Doehr*-version *Mathews* test are being applied, without consideration of *malicious* deprivation and without any *standard* to guide judges in balancing between predeprivation safeguards and postdeprivation safeguards and remedies, to determine constitutionally-required Due Process.[1] Further, these cases deal only with *erroneous* deprivation and fail to

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process. The United States Supreme Court disagreed with Connecticut's postdeprivation remedy of double or treble damages being an adequate safeguard. Clearly, the Supreme Court does not consider a pound of postdeprivation cure equal to an ounce of predeprivation prevention. Virginia has no wrongful use of civil procedure statute.

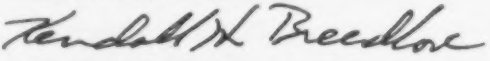
[1] See cases at Appendix Exhibit 1, p. A-3, note 1.

consider *malicious* deprivation or remedies for redress of damages caused by the deprivation.[1]

4. Because the *Mathews* test originated for testing the constitutional Due Process of Government-instituted deprivations, there was no substantive requirement to address *malicious* actions by the Government in the test. It can be assumed that the Government is not malicious in its actions. The same cannot be said about private-party-instituted deprivations.

5. Thus, the time is appropriate that the three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage—updated in 1991 for private-party-instituted deprivations in *Doehr, supra*—should be augmented with a *fourth* part—considering security safeguards against *malicious* abuse or perversion to unwarranted ends: (1) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (2) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (i) for swiftly setting right the malicious deprivation, and (ii) for redressing the damages.

Respectfully submitted,



Kendall H. Breedlove, *pro se*
2831 Gallows Road, Suite 145
Falls Church, Virginia 22042

August 30, 1994

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[1] "'The purpose of this requirement [*the right to prior notice and a hearing*] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize **substantially unfair** or mistaken deprivations of property... .' *Fuentes v. Shevin*, 407 U.S., at 80-81, 92 S.Ct., at 1994-1995." [bold emphasis added by Petitioner to *U.S. v. James Daniel Good Real Property, id.*, at 500-501.]

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CERTIFICATE OF SERVICE

SS: COMMONWEALTH OF VIRGINIA
County of Fairfax, to-wit:

KENDALL H. BREEDLOVE, being first duly sworn, upon his oath deposes and says that he is filing *pro se*, and that on this 30th day of August, 1994, pursuant to Rule 29.5 (c) of the Supreme Court Rules, he mailed three copies of the ***Supplemental Brief in Support of Petition for Writ of Certiorari*** by first-class mail, postage pre-paid, to each of the Respondents, or their counsel, as follows:

Mr. Calvin W. Phillips, *pro se*,
Respondent,
310 Maple Avenue West, Suite 198
Vienna, Virginia 22180; and

Mr. J. Charles Curran, attorney of record for
Respondents Joyce E. Horton and James H. Horton,
Kidwell, Kent & Curran
9695-C Main Street
Fairfax, VA 22031; and

Pursuant to Rule 29.4 (c), citing that 28 USC §2403 (b) may be applicable, he mailed three copies of the ***Supplemental Brief in Support of Petition for Writ of Certiorari*** by certified mail, postage prepaid, on 30 August, 1994, addressed as follows:

The Honorable James S. Gilmore III
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

Kendall H. Breedlove

Kendall H. Breedlove, *pro se*

SUBSCRIBED and Sworn to before me on 30th of August, 1994.

Notary Public

My commission expires: 10/31/95

VIRGINIA
FAIRFAX COUNTY.

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APPENDIX

Exhibit 1 (Case Evolution of Judicial *Approach* regarding the *Mathews* Test)

A. The Constitutional Philosophy Underlying the Cases' Evolution—

1. Most certainly, the drafters of the Constitution intended to secure American freedoms against wilful and, especially, malicious deprivations of constitutionally-protected interests. It is unlikely that the later drafters of the Fourteenth Amendment to the United States Constitution intended to protect the citizenry from only *erroneous* deprivations of those interests, while having no regard for willful or *malicious* deprivations of those same interests.

a. Consequently, it follows logically, that for a law to be constitutional, the law must prescribe safeguards to prevent wilful and malicious abuse or perversion of the law to unwarranted ends resulting in *malicious* deprivations of constitutional interests as well as to prevent the *erroneous* deprivations of those same interests.[1]

b. Hence, to be constitutional, procedural due process must provide safeguards against all three forms of deprivation: erroneous, wilful, and malicious. Additionally, the procedural due process must prescribe procedures for the swift correction of deprivation, whether erroneous or malicious, and remedial procedures for redress of damages. Without these security safeguards and remedial procedures, the constitutional interests of the citizenry cannot be protected adequately and erroneous or malicious deprivations of constitutionally-protected interests will ensue.

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1 "...but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The Constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any 'abuse' of state power. * * * In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation *without due process of law*—without adequate procedures." [*Daniels v. Williams*, 474 US 327, at 338-9, 88 L.Ed.2d 662, at 673, 106 S.Ct. 662 (1986).]

c. And, to judge that constitutionality, a judicial *approach* must likewise address all three forms of deprivation, to fulfill the intent of the drafters of the Fourteenth Amendment.

2. There are certain basic freedoms related to life, liberty, and property which many men and women throughout the history of our country died to win and to protect, which we as Americans will not allow to be taken from us, not by malice, not by intent, not by mistake, without Due Process of law, and the citizenry will not tolerate an after-the-fact excuse of "Oops, I didn't know that was your freedom I was treading upon."

B. The Syllogistic System Underlying the Cases' Evolution—

1. The cases demonstrate a piecemeal, *ad hoc* approach rather than a systems approach to judicial constitutionality testing of Due Process.

2. Based on systems theory, a complete judicial *approach* consists of: (a) a *methodology*, (b) one or more *standards*, (c) *user-instructions*, (d) *update-guidance*, (e) *error-safeguards*, (f) *security-safeguards against abuse*, and (g) *remedial procedures* for error correction and for redress of damages. "*Approach*" is used herein to mean a solution to a group of legal problems; it is an encapsulation of a proven means for resolving constitutional questions associated with these type of legal problems which may be recommended safely to future generations for their guidance. The *approach* serves as a bridge, providing continuity with past tradition, custom, and *stare decisis*, which has been proven in the present, and may be handed down with recommendation to the future generations for their guidance in resolving similar problems and, equally, new problems the nature of which cannot be imagined today.

3. A judicial test is a *methodology*, which is one component of a complete judicial *approach*. A judicial test typically consists of several factors, which are actually *criteria* to be used by the judge for his evaluation. What may or may not be stated are the relative *weights* to be ascribed to these *criteria* used in the judicial test. In making the judicial evaluation, to what *criteria* should the judge

ascribe most importance or *weight* in the judge's decision? In the context of the *Mathews* test, the ultimate question is whether any amount of postdeprivation remedies make up for a lack of adequate predeprivation safeguards to prevent an erroneous or malicious deprivation from occuring in the first place. That is, is a pound of postdeprivation cure equal to an ounce of predeprivation prevention? Is procedural due process adequate?

C. Comparing Cases to the Syllogistic System Highlights Need to Recognize Safeguards in Law Against Wilful, Malicious Deprivations—

1. A law, regulation, ordinance, custom or usage lacking: (a) safeguards against error, (b) safeguards against malicious abuse or perversion to unwarranted ends, (c) remedial procedures for the swift correction of deprivation, either erroneous or malicious, and (d) remedial procedures for redress of damages, cannot be constitutional for it does not protect adequately the constitutional interests of the citizenry. It is constitutionally-deficient in procedural due process.

2. *Webster's New World Dictionary of the American Language*, 2d college ed., at 476, defines *error* in several ways as: "3. something incorrectly done through ignorance or carelessness; mistake ... 7. *Law* a mistake in judgment or proceedings of a court of record, usually prejudicial to the complainant." Thus, consideration of *erroneous* deprivation connotes a focus of inquiry on deprivation by mistake or negligence, and not a focus on wilful, or malicious deprivation.

3. Supreme Court cases reveal an evolving judicial *approach* to Due Process and property; Federal and State cases show that the *Mathews* test and the updated, *Doehr*-version *Mathews* test are being applied, without consideration of *malicious* deprivation and without any *standard* to guide judges in balancing between predeprivation safeguards and postdeprivation safeguards and remedies, to determine constitutionally-required Due Process.[1]

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[1] See *Mathews v. Eldridge, supra; Connecticut v. Doehr, supra; U.S. v. James*

4. The three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage—set forth in 1976 for *Government-instituted* deprivations in *Mathews v. Eldridge, supra,* and updated in 1991 for *private-party-instituted* deprivations in *Connecticut v. Doehr, supra*—addresses *erroneous* deprivations and does not contain a *fourth* part to deal with *malicious* deprivations—security safeguards against *malicious* abuse or perversion to unwarranted ends: (a) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (b) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (1) for swiftly setting right the malicious deprivation, and (2) for redressing the damages.

5. a. In his dissenting opinion in *Connecticut v. Doehr, supra,* **Renquist, C.J.,** stated:

> "I agree with the Court, however, that upon analysis the deprivation here is a significant one, even though the owner remains in undisputed possession. 'For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.' Ante, p. —, 115 L Ed 2d, at 14. **Given the elaborate system of title records relating to real property which prevails in all of our states, a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its value to him."** [*bold emphasis added by Petitioner to Connecticut v. Doehr, id.*, at 24.]

b. **Renquist's,** C.J., comment about the elaborate systems

Daniel Good's Real Property, supra, Dolan v. City of Tigard, slip op., (1994); *Wyatt v. Cole,* 112 S.Ct. 1827 (1992); *Reardon v. U.S.,* 947 F.2d 1509 (1st Cir., 1991); *Shaumyan v. O'Neill,* 987 F.2d 122 (2nd Cir., 1993); *New Brunswick Savings Bank v. Markouski,* 123 NJ 402, 587 A.2d 1265 (1991); *Keystone Builders, Inc. v. Floor Fashion of Virginia, Inc, et al.,* (W.D.Va., no. C. A. 93-0001-C [unpublished], July 29, 1993).

of title records prevalent in all the states underscores the importance of protecting those record systems—large information systems really—from error or abuse, and in so doing, protecting the property interests represented therein from erroneous or malicious deprivation.

D. Safeguarding Information Systems, including Legal Information Systems—

1. Constitutional property interests exist, in large measure, in the public land records, which are proof of property ownership, interests, encumbrances, and entitlements. Hence, to safeguard the information system of the public records is tantamount to protecting the constitutional property interests. The cases have not addressed this point or the following considerations.

2. A useful concept to draw upon for guidance is the concept of error control in information systems, because legal systems and particularly land records systems are large information systems. In information systems, the principle has been well proven that the attention which should be devoted to the prevention of an error is directly proportional to the potential impact of that error. Only routine efforts need be directed at preventing the occurence of a minor error, the effects of which are easily remedied. However, where the effects of an error are not easily or inexpensively remedied, or where the impact of the error may be catastrophic, extensive effort and safeguards are emplaced to prevent the occurence of that potential error.

3. One end of this spectrum may be seen in the "zero-defects" program of aerospace contractors in space programs, such as the journey of man to the moon. In law, the same attentiveness is given to preventing a person from being deprived of their life erroneously — because it cannot be undone.

4. It is well worth noting that large systems, be they information systems or aerospace systems, have two sets of procedures — to satisfy two distinct and separate needs: (a) the need to control inadvertent error and (b) the need to protect the system from sabotage, subversion, embezzlement, or other abuses

which are *malicious* in their intent. Although certain procedures may serve both functions, there remains the requirement for satisfying the two different safeguarding needs.

5. Also, large systems require *remedial procedures* for what to do in the event the error control procedures or the security procedures fail or are subverted — how are the resultant errors corrected; how is the damage set right?

6. Thus, a state law, regulation, ordinance, custom or usage which creates procedures for or within a legal information system, such as procedures for the creation of attachments, liens, notices of *lis pendens*, and other encumbrances upon property, within the context of the large information systems of the public land records, needs: (a) safeguards against error; (b) safeguards against malicious abuse or perversion to unwarranted ends; (c) remedial procedures for the swift correction of deprivation whether erroneous or malicious; and (d) remedial procedures for redress of damages. Without these safeguards and remedial procedures, erroneous or malicious deprivations of constitutionally-protected interests of property, liberty, and entitlements to due process, equal protection under law, and civil trial by jury, will ensue. Such a state law, regulation, ordinance, custom, or usage—lacking these necessary safeguards and remedial procedures—cannot be constitutional for it does not protect adequately these constitutionally-protected interests.

E. Comparing Cases to the Syllogistic System Highlights Needs—

1. Comparing the cases to the syllogistic system permits identifying voids in the law and highlights needed definition. In the instant action, the highlighted needs omitted by the cases are:

- Need to augment the *Mathews* test to address *malicious* deprivation,
- Need to propound a *Mathews* standard, and
- Need to publish post-*Doehr* cases of constitutional challenges to creditor remedies in Virginia.

2. *Cases Disclose Need to Augment Mathews' Test—*

a. If it be that any constitutional state law, regulation, ordinance, custom or usage requires certain security safeguards and remedial procedures, then any judicial *approach* which seeks to evaluate the constitutional impact of a state law, regulation, ordinance, custom or usage which creates procedures for or within a legal information system, such as procedures for the creation of attachments, liens, notices of *lis pendens*, and other encumbrances upon real property, within the context of the large information systems of the public land records, needs to review and evaluate specifically these particular security safeguards and remedial procedures.

b. Various United States Supreme Court cases have either, upon initial consideration of an issue, posited a judicial test—a *methodology*—or, over time and use, have developed a judicial test.[1]

c. Reading of the cases in footnote one, below, discloses that oftentimes a *methodology* surfaces in a case, but after a number of other cases, it becomes apparent to the courts that a *standard* is lacking to provide consistency of results and repeatability. Thus, a subsequent decision will then propound the *standard* to accompany the *methodology*. Reading of similar cases spanning long periods of time (*e.g.*, many decades), discloses that the effects of societal change manifest themselves in the need to update an *approach*, usually by altering *criteria*, altering *weights*, or revising the *standard* (frequently by raising or tightening it).

d. These cases in footnote one, below, show that the

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[1] See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), *Connecticut v. Doehr, supra*, (1991), *United States v. James Daniel Good's Real Property*, 114 S.Ct. 492 (1993), and, most recently, *Dolan v. Tigard*, slip op., (1994).

Mathews test and the updated, *Doehr*-version *Mathews* test are being applied, without considering *malicious* deprivation and without any *standard* to guide judges in balancing between predeprivation safeguards and postdeprivation safeguards and remedies, to determine constitutionally-required Due Process. Further, these cases deal only with *erroneous* deprivation and fail to consider *malicious* deprivation or remedies for redress of damages caused by the deprivation.

e. *Mathews v. Eldridge, supra,* set forth a three-part *methodology* in 1976 which was updated and employed in *Connecticut v. Doehr, supra,* in 1991. The three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage when the government itself seeks to effect a deprivation on its own initiative was set forth in *Mathews v. Eldridge, supra,* and was *updated* to address testing for the constitutionality of Due Process afforded by a state statute enabling an individual to enlist the State's aid to deprive another of his or her property by means of prejudgment attachment in *Connecticut v. Doehr, supra.* The *updated* three-part *Mathews* test of *Doehr, supra,* gives consideration to: (1) the private interests affected; (2) the predeprivation safeguards against *erroneous* deprivation, and the adequacy of postdeprivation safeguards; and (3) the interest of the private party seeking the prejudgment remedy with due regard for any ancillary interest the government may have and the impact upon the state of providing additional safeguards.

f. *Connecticut v. Doehr, supra,* gives indication, both in the main opinion and in the dissent, that the criteria of the three-part *Mathews* test or *methodology* may require augmentation to make the test more broad based in its applicability. Not a "one size fits all" test, but a "one size fits more than one" test. Specifically, the questions of showing of exigent circumstances and posting a lienor bond as a remedy for redress of lienee injury were raised in *Doehr* by the plurality and by the dissent. The *weight* ascribed to two elements was stressed: *notice* and *an opportunity to be heard* were stressed as minimally-acceptable due process.

g. The dissent by **Renquist, C.J., and Blackmun, J.**, in *Connecticut v. Doehr, id.*, at 24, states:

> "Materialman's and mechanics' lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on his promise to pay for the labor and the materials. To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes."

(1) This dissent ignores the successful experience of Hawaii and Maryland with requiring prior notice, full predeprivation judicial hearing, and mechanics' liens attaching only upon a judge's signed order (*n.b.*, since Maryland's Supreme Court struck down its old mechanics' lien law in *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 353 A.2d 222 (Md., 1976)).

(2) Further, this dissent ignores the fact that the significant use of mechanics' liens is by large contractors on large commercial or office building programs, who are advised by prominent law firms, not by individual workmen or by small businessmen.

(3) Moreover, this dissent ignores the fact that the substantive problems for which mechanics' liens are employed commonly concern the non-payment of subcontractors by the general contractor, after the general contractor has been paid by the owner. It is inappropriate to hold hostage the owner's property as remedy for this situation. Rather, state laws should enforce requirements for payment by other means, including payment bonds.

h. Following *Doehr*, in 1993, *United States v. James Daniel Good's Real Property, supra*, addressed the question of a showing of exigent circumstances and whether an *ex parte* probable-cause hearing before a Federal magistrate, by the Justice Department, for the seizure of a convicted drug offender's four-acre property in

Hawaii, prior to a judgment of forfeiture, was a substitute for *notice* and and *an opportunity to be heard* as due process. *U.S. v. James Daniel Good Real Property, supra,* held that such *ex parte* hearing was not an adequate substitute for *notice* and *an opportunity to be heard,* before Mr. Good was deprived of some of the sticks in the bundle of rights known as property, prior to a judgment of forfeiture. Mr. Good's property was rented to tenants at the time of seizure and the Government did not displace those tenants, but merely had them pay rent to the Government. "The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right of unrestricted use and enjoyment, and the right to receive rents." [*U.S. v. James Daniel Good Real Property, id.*, at 501.][1]

i. In 1994, *Dolan v. City of Tigard, supra,* addressed the subject of the two-part *methodology* of *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107B S.Ct. 3141 (1987) for use in in Fifth Amendment takings: (a) does an "essential nexus" exist between a legitimate state interest and the permit condition; (b) if so, do the degree of exactions demanded by the permit conditions bear the required relationship to the projected impact of the proposed development. [*Dolan v. Tigard,* slip op., at 10-11 (1994).] Furthermore, *Dolan, supra,* set forth the *standard* to be used for assessing that required relationship as to Fifth Amendment takings: a "rough proportionality." [*Id.*, at 16.]

j. *Dolan v. City of Tigard, supra,* provides certain *instructions for use.* For example, quoting from *Nollan, supra,* which quotes in turn from *Penn Central*, 438 U.S. 104 (1978), "'A use

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[1] "The court [*of Appeals for the Ninth Circuit*] was unanimous in holding that the seizure of Good's property, without prior notice and a hearing, violated the Due Process Clause. * * * We now affirm the due process ruling... ." [*U.S. v. James Daniel Good Real Property, id.*, at 498.] "The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property... .' *Fuentes v. Shevin*, 407 U.S., at 80-81, 92 S.Ct., at 1994-1995." [*Ibid.*, at 500-501.]

restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial purpose.'" [*Dolan v. Tigard, id.*, at 13.] Also, to foster repeatability of results and consistency in the application of the *Nollan methodology*, the *user instruction* is set forth: "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." [*Id.*, at 16.] In considering the degree of exactions demanded, the Court stated: "The difference to petitioner, of course, is her ability to exclude others. As we have noted, this right to exclude others is **'one of the most-essential sticks in the bundle of rights that are commonly characterized as property.'** *Kaiser Aetna*, 444 U.S., at 176." [bold emphasis added by Petitioner to *Dolan, id.*, at 18.]

3. Cases Disclose Need to Propound Mathews' Standard—

a. Over the period 1991 – 1993, following *Doehr*, other courts have applied the updated, *Doehr*-version three-part *Mathews v. Eldridge* methodology. (See *Wyatt v. Cole*, 112 S.Ct. 1827 (1992); *Reardon v. U.S.*, 947 F.2d 1509 (1st Cir., 1991); *Shaumyan v. O'Neill*, 987 F.2d 122 (2nd Cir., 1993).) These cases demonstrate the need for the Supreme Court to state the *standard* to be used in evaluating the results of the *Mathews* test. The Petitioner notes in *Reardon v. U.S., supra*, that the United States Court of Appeals for the First Circuit has done an excellent job of extracting and stating the subcriteria implicit in the *Mathews* test; that is, of setting forth the *methodology* clearly. Even state courts have embraced the *Mathews* test. See *New Brunswick Savings Bank v. Markouski*, 123 NJ 402, 587 A.2d 1265 (1991), which applied a *Mathews* test and held that a levying creditor must provide actual notice of an execution sale to judgment creditors whose names and addresses are reasonably ascertainable; *Keystone Builders, Inc. v. Floor Fashion of Virginia, Inc, et al.*, (W.D.Va., no. C. A. 93-0001-C [unpublished], July 29, 1993), which applied a *Doehr*-version *Mathews* test to Virginia's prejudgment attachment statute, *Va. Code §8.01-533 et seq.*

b. Thus, the cases demonstrate that the time is appropriate

that the three-part *Mathews* test for the constitutionality of Due Process afforded by a statute, regulation, ordinance, custom or usage, which was updated in 1991 for private-party-instituted deprivations in *Connecticut v. Doehr, supra,* should be augmented with a *fourth* part—considering security safeguards against *malicious* abuse or perversion to unwarranted ends: (1) the predeprivation safeguards against *malicious* deprivation, including the procedures for deterring malicious abuse, and (2) the postdeprivation safeguards against *malicious* deprivation, including the procedures: (i) for swiftly setting right the malicious deprivation, and (ii) for redressing the damages.

c. The minimum elements of Due Process—notice and an opportunity to be heard [*Mullane v. Central Hanover B. & T. Co.*, 339 US 306, at 313, 94 L.Ed 865, at 873, 70 S.Ct. 652 (1950) and its progeny]—are important prior to a lien attaching, because the lien surfaces typically in a real estate title search; the Virginia general contractor's mechanics' lien *requires no notice* to the property owner.[1] One of these instant malicious liens against the Petitioner surfaced in a title search on Friday the 13th of March, 1992, on the morning of the Petitioner's real estate settlement.[2]

d. The unfairness of state procedures only providing release of falsely-liened property by a *Virginia Code §43-17.1* suit, or by procuring a lienee bond for ridiculous cash requirements in states permitting such release by bond—while trying to hold a real estate deal together at the 11th hour, due to lack of notice of the lien—demonstrates the imperative need for *predeprivation* due process

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[1] "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." [*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, at 800, 77 L.Ed.2d 180, at 188, 103 S.Ct. 2706, at 2712 (1983).]

[2] The Petitioner's name and address were reasonably ascertainable and were included in the false mechanics' liens, yet no actual notice by mail or otherwise was given to Petitioner of the false liens' filing. The filing of the instant false liens affected Petitioner's property interest significantly and adversely.

safeguards, that prevent erroneous or malicious deprivation and deter abuse of the lien statutes, and makes clear the present lack in Virginia mechanics' lien law of "rough parity of procedural burden," and the clear need for a *Mathews* standard.

e. *Mullane* and its progeny fail to address the heightened importance of notice and an opportunity to be heard in circumstances of *malicious* deprivation, "to give the citizen the opportunity to try to prevent the deprivation from happening"[1] and to deter the malicious abuser of statutory law.

*F. Research Discloses Lack of Published Cases in Virginia of Recent Post-*Doehr *Constitutional Challenges to Creditor Remedies—*

1. This area of the law—mechanics' liens—needs the bright light of day shown upon it in judicial decisions published for the guidance of all, not hidden away, as though the proceedings of a star chamber.

2. Since the 1988 *Donohoe, supra,* case, courts in Virginia have demonstrated a predeliction not to publish cases which challenge the constitutionality of Virginia creditor remedies. And more particularly, since the 1991 decision of *Connecticut v. Doehr, supra,* in which this Court stated that state laws creating attachments, liens, and similar encumbrances on property are subject to the strictures of Due Process, cases brought in Virginia challenging the constitutionality of Virginia law, under theories arising from *Doehr,* have not been published.

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[1] *Daniels v. Willaims,* 474 US 327, at 338-9, 88 L.Ed.2d 662, at 673, 106 S.Ct. 662 (1986).

a. The Virginia Supreme Court has refused appeal and declined to publish at least three recent cases involving constitutional challenges to mechanics' liens under theories of *Doehr*.[1]

b. The United States District Court for the Western District of Virginia failed to publish its 7-page opinion memorandum, documenting its application of the updated *Doehr*-version, *Mathews* test, in a case challenging the Virginia prejudgment attachment statute under theories of *Doehr*.[2]

c. The Arlington Circuit Court refused to prepare and publish a memorandum of its opinion and decision in *Breedlove v. Hart, et al.*, (17th Cir., Arlington at law #93-872, [unpublished], 1994), when prayed for explicitly by written motion of the Petitioner in his *Petition to Rehear*, which contained challenges, with supporting evidence, to Virginia law and judicial procedure based on lack of Due Process, lack of Equal Protection under law, and denial of Civil Trial by Jury—the trial judge stating that, after a year of litigation of the matter, he did not have time. Petitioner has filed *Notice of Appeal* to the Virginia Supreme Court in *Breedlove v. Hart, et al.*, Arlington at law #93-872.

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1 *Federal Deposit Insurance Corp. v. Corman Construction, Inc., et al*, Va. record no. 921452, [unpublished] (1993), appealed from §43-17.1 hearing in Arlington Circuit Court, containing a constitutional challenge to the Virginia mechanics' lien law: refused appeal by Virginia Supreme Court; *American Security Bank, et al. v. Dempsey Supply Corp.*, Va. record no. 930590, [unpublished] (1993), appealed from §43-17.1 hearing in Fairfax Circuit Court, containing a constitutional challenge to the Virginia mechanics' lien law: refused appeal by Virginia Supreme Court; *Breedlove v. Phillips, et al.*, Va. record no. 931104, [unpublished] (1994), the instant action, appealed from dismissal of suit for damages in Fairfax Circuit Court, subsequent to two successful §43-17.1 hearings invalidating two mechanics' liens, containing a constitutional challenge to the Virginia mechanics' lien law: refused appeal by Virginia Supreme Court.

2 *Keystone Builders, Inc. v. Floor Fashion of Virginia, Inc, et al.*, (W.D.Va., no. C. A. 93-0001-C [unpublished], July 29, 1993), quoted in *American Security Bank, et al. v. Dempsey Supply Corp.*, S.Ct. No. 93-236, Suppl. Brief to Pet. for Cert., Appendix, pp. 1a – 7a, Sept. 15, 1993; *cert. denied* 114 S.Ct. 305 (1993). Also cited in *Commonwealth Land Title Ins. Co. v. Corman Construction, Inc., et al.*, S.Ct. No. 92-1871, Suppl. Brief to Pet. for Cert., p. 2, Sept. 15, 1993; *cert. denied* 114 S.Ct. 70 (1993).

3. In a series of court actions, one single plaintiff (the Petitioner) has explored by litigating in Virginia every possible branch of any common-law route to redress for the false, libelous, malicious mechanics' liens which presented itself as being even vaguely possible. This search for redress included specifically the purported route of redress set forth in *Donohoe*, that is: prosecute successfully *Virginia Code §43-17.1* chancery suits, to obtain adjudication of the false liens' invalidity as proof of favorable termination of the underlying malicious prosecution, then procede in actions for malicious prosecution or abuse of process. The end result of the Petitioner's series of litigation is that **Petitioner's every cause of action for redress**—through common-law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process, and civil conspiracy—**has been dismissed at the Virginia trial court level**, upon *demurrer*, before any cause of action or punitive damage claim could reach a jury.

4. The failure of Courts in Virginia to publish cases challenging the constitutionality of Virginia creditor remedy statutes—particularly mechanics' liens—and to refuse to hear three known appealed cases, including the Petitioner's case, challenging the constitutionality of Virginia's mechanics' lien law under theories arising under *Doehr*, highlights the need for this Honorable Court to grant *certiorari* for this instant action and to review the Due Process provided by the Virginia mechanics' lien law as it relates to false, libelous, malicious mechanics' liens and by the Virginia judicial procedure under *Donohoe*, for the redress of false, libelous, malicious mechanics' liens.